

CASE NO. 14-15700

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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S. ROWAN WILSON,

Petitioner-Appellant,

v.

ERIC HOLDER, as Attorney General of the United States; THE U.S. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; B. TODD JONES, as Acting Director of the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives; ARTHUR HERBERT, as Assistant Director of the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives; and THE UNITED STATES OF AMERICA,

Respondents-Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT,  
DISTRICT COURT OF NEVADA

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OPENING BRIEF OF PETITIONER S. ROWAN WILSON

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1 the individual defendants in their official capacities (collectively, the United States), by their  
2 undersigned counsel, hereby move this Court to dismiss Plaintiff's Complaint or, in the  
3 alternative, to enter summary judgment for Defendants. A Memorandum of Points and  
4 Authorities accompanies this motion, along with an Appendix of Secondary Material and a  
5 Statement of Undisputed Material Facts.

6 Dated: February 3, 2012

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## INTRODUCTION

One provision of the Gun Control Act of 1968, as amended—18 U.S.C. § 922(g)(3)—prohibits an unlawful user of a controlled substance from possessing a firearm, while another provision—18 U.S.C. § 922(d)(3)—makes it unlawful to sell a firearm while knowing or having reasonable cause to believe that the purchaser is an unlawful user of a controlled substance. Under the Controlled Substances Act, marijuana is classified as a Schedule I controlled substance that cannot be lawfully prescribed and that the general public may not lawfully possess. Although a number of states, including Nevada, have exempted from state criminal prosecution certain individuals who use marijuana for medical purposes,<sup>1</sup> these state laws do not alter the fact that marijuana possession remains prohibited under federal law. To advise federal firearms licensees (“FFLs”) of this basic fact, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) issued an Open Letter to all FFLs on September 21, 2011, stating that “any person who uses . . . marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of . . . a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition.” See Compl., Ex. 2-B. The Open Letter further informed FFLs that “if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have ‘reasonable cause to believe’ that the person is an unlawful user of a controlled substance” and “you may not transfer firearms or ammunition to the person.” Id. (quoting 18 U.S.C. § 922(d)(3)).

Alleging that she possesses a medical marijuana registry card issued by the State of Nevada and has been prevented from purchasing a handgun, Plaintiff S. Rowan Wilson claims that 18 U.S.C. § 922(g)(3), 18 U.S.C. § 922(d)(3), an ATF regulation defining certain statutory

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<sup>1</sup> As discussed herein, see infra at 5, the federal government does not recognize a medical use for marijuana. Any use in this memorandum of terms such as “medical use” or “for medical purposes” should not be read to suggest otherwise.

terms, and ATF's September 2011 Open Letter "prohibit[] a certain class of law-abiding, responsible citizens from exercising their right to keep and bear arms" and therefore violate the Second Amendment and the equal protection component of the Fifth Amendment's Due Process Clause. Compl. ¶ 3. Plaintiff seeks a declaratory judgment, a permanent injunction, and monetary damages, but she has failed to state a claim for which relief can be granted.

First, Plaintiff's claim that § 922(g)(3) violates her Second Amendment rights must fail because the Ninth Circuit has already rejected a Second Amendment challenge to this provision, see United States v. Dugan, 657 F.3d 998 (9th Cir. 2011), and that constitutional analysis is not altered when the provision is applied to prohibit firearm possession by someone who uses marijuana in accordance with state law but in violation of federal law. Second, because it is consistent with the Second Amendment to prohibit any and all unlawful drug users from possessing firearms and because the Second Amendment does not convey a right to sell firearms, there can be no Second Amendment violation as a result of § 922(d)(3)'s ban on selling firearms to someone the seller knows or has reasonable cause to believe is an unlawful drug user, including those who possess a state-issued medical marijuana card as a result of having affirmatively registered to use marijuana. Third, Plaintiff's equal protection claim fails because she is not similarly situated to persons who are not violating federal law by using marijuana. And finally, even if Plaintiff had stated a claim against the federal government, no waiver of sovereign immunity allows her to recover monetary damages from the United States, whether for her constitutional damages claims or her conspiracy claim. Accordingly, the Complaint should be dismissed in its entirety.

## BACKGROUND

### I. THE GUN CONTROL ACT AND THE CONTROLLED SUBSTANCES ACT

The Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220, included a provision—now codified at 18 U.S.C. § 922(g)—designed "to keep firearms out of the hands of presumptively risky people," including felons, the mentally ill, fugitives from justice, and

1 unlawful drug users. Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n.6 (1983).

2 Specifically, as applied to unlawful drug users, § 922(g)(3) provides that

3 [i]t shall be unlawful for any person . . . who is an unlawful user of or addicted to  
4 any controlled substance (as defined in section 102 of the Controlled Substances  
5 Act (21 U.S.C. § 802)) . . . to . . . possess in or affecting commerce, any firearm or  
ammunition; or to receive any firearm or ammunition which has been shipped or  
transported in interstate or foreign commerce.

6 18 U.S.C. § 922(g)(3). To help effectuate the firearm exclusions in § 922(g), Congress also  
7 banned selling firearms to the same categories of presumptively risky people; as relevant here,  
8 § 922(d)(3) makes it

9 unlawful for any person to sell or otherwise dispose of any firearm or ammunition  
10 to any person knowing or having reasonable cause to believe that such person . . .  
11 is an unlawful user of or addicted to any controlled substance (as defined in  
section 102 of the Controlled Substances Act (21 U.S.C. § 802)).

12 Id. § 922(d)(3).

13 In addition to challenging the constitutionality of these two provisions, Plaintiff also  
14 targets 27 C.F.R. § 478.11, a regulation issued by ATF to define certain statutory terms.  
15 Specifically, the regulation defines an “[u]nlawful user of or addicted to any controlled  
16 substance” as

17 [a] person who uses a controlled substance and has lost the power of self-control  
18 with reference to the use of the controlled substance; and any person who is a  
19 current user of a controlled substance in a manner other than as prescribed by a  
20 licensed physician. Such use is not limited to the use of drugs on a particular day,  
21 or within a matter of days or weeks before, but rather that the unlawful use has  
22 occurred recently enough to indicate that the individual is actively engaged in  
23 such conduct. A person may be an unlawful current user of a controlled  
substance even though the substance is not being used at the precise time the  
person seeks to acquire a firearm or receives or possesses a firearm. An inference  
of current use may be drawn from evidence of a recent use or possession of a  
controlled substance or a pattern of use or possession that reasonably covers the  
present time . . . .

24 27 C.F.R. § 478.11. Additionally, the regulation echoes §§ 922(g)(3) and 922(d)(3) by providing  
25 that a “controlled substance” is “[a] drug or other substance, or immediate precursor, as defined  
26 in section 102 of the Controlled Substances Act, 21 U.S.C. § 802.” Id.

Section 102 of the Controlled Substances Act, in turn, defines “controlled substance” as “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter [21 U.S.C. § 812].” 21 U.S.C. § 802(6). Since the enactment of the Controlled Substances Act, marijuana (also known as cannabis) has been classified as a Schedule I drug. 21 U.S.C. § 812(c), Schedule I(c)(10). By classifying marijuana as a Schedule I drug, Congress has determined that marijuana “has a high potential for abuse,” that it “has no currently accepted medical use in treatment in the United States,” and that “[t]here is a lack of accepted safety for use of [marijuana] under medical supervision.” *Id.* § 812(b)(1).<sup>2</sup> As such, Schedule I drugs, including marijuana, cannot be legally prescribed for medical use. *See* 21 U.S.C. § 829; *see also* *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491 (2001) (“Whereas some other drugs can be dispensed and prescribed for medical use, . . . the same is not true for marijuana.”). Additionally, it is generally unlawful for any person to knowingly or intentionally possess marijuana. *See* 21 U.S.C. § 844(a). For Schedule I drugs like marijuana, the only exception to this ban on possession is for a federally approved research project. *See id.* § 823(f); *see also* *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (“By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the . . . possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study.”).

## II. NEVADA’S LAW REGARDING THE MEDICAL USE OF MARIJUANA

Separate and apart from federal law, the State of Nevada also criminalizes the possession of marijuana. *See* Nev. Rev. Stat. § 453.336. In 2000, however, Nevada’s Constitution was

<sup>2</sup> The Controlled Substances Act delegates authority to the Attorney General to reschedule controlled substances after consulting with the Secretary of Health and Human Services. *Id.* § 811. The Department of Justice’s Drug Enforcement Agency (“DEA”) has repeatedly denied petitions to have marijuana removed from schedule I, most recently in 2011. *See* Notice of Denial of Petition, 76 Fed. Reg. 40552 (July 8, 2011); *see also* *Gonzales v. Raich*, 545 U.S. 1, 15 & n.23 (2005). Based largely on scientific and medical evaluations prepared by the Department of Health and Human Services, DEA has consistently found that marijuana continues to meet the criteria for schedule I control. *See* 76 Fed. Reg. at 40552.

amended by initiative petition to add the following provision regarding the medical use of marijuana:

The legislature shall provide by law for . . . [t]he use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by seizure; multiple sclerosis and other disorders characterized by muscular spasticity; or other conditions approved pursuant to law for such treatment.

Nev. Const. art. IV, § 38(1)(a). Pursuant to this constitutional amendment, Nevada enacted legislation in 2001 that exempts the medical use of marijuana from state prosecution in certain circumstances. See Nev. Rev. Stat. Ch. 453A. Subject to certain exceptions, the law provides that “a person who holds a valid registry identification card . . . is exempt from state prosecution for . . . [a]ny . . . criminal offense in which the possession, delivery or production of marijuana . . . is an element.” Nev. Rev. Stat. § 453A.200(1)(f).<sup>3</sup> This exemption only applies to the extent that the holder of a registry identification card (i) engages in “the medical use of marijuana in accordance with the provisions of this chapter as justified to mitigate the symptoms or effects of the person’s chronic or debilitating medical condition;” and (ii) “[d]o[es] not, at any one time, collectively possess, deliver or produce more than . . . [o]ne ounce of usable marijuana[,] [t]hree mature marijuana plants[,] and [f]our immature marijuana plants.” Id. § 453A.200(3).

The law also specifies who is eligible to receive a state-issued registry identification card, requiring applicants to provide, inter alia, “[v]alid, written documentation from the person’s attending physician stating that . . . [t]he person has been diagnosed with a chronic or debilitating medical condition.” Id. § 453A.210(2)(a)(1).<sup>4</sup> The applicant must also provide documentation

<sup>3</sup> The statute specifies, however, that cardholders are not exempt from state prosecution for a number of other crimes related to marijuana use. Id. § 453A.300(1). In addition, a separate provision of Nevada law specifies that “[a] person shall not own or have in his or her possession or under his or her custody or control any firearm if the person . . . [i]s an unlawful user of, or addicted to, any controlled substance,” and defines the term “controlled substance” by reference to the federal Controlled Substances Act. Nev. Rev. Stat. § 202.360(1)(c), (3)(a).

<sup>4</sup> The statute defines the term “chronic or debilitating medical condition” to include AIDS, cancer, and glaucoma, as well as “[a] medical condition or treatment for a medical condition that

(Footnote continued on following page.)

from his or her physician stating that “[t]he medical use of marijuana may mitigate the symptoms or effects of that condition” and that “[t]he attending physician has explained the possible risks and benefits of the medical use of marijuana.” Id. § 453A.210(2)(a)(2)–(3). The state-issued registry identification card is valid for one year and must be renewed by annually submitting updated written documentation from the cardholder’s attending physician, including proof that the individual continues to suffer from a chronic or debilitating medical condition. Id. §§ 453A.220(4), 453A.230. If a cardholder is “diagnosed by the person’s attending physician as no longer having a chronic or debilitating medical condition, the person . . . shall return the[] registry identification card[] to the [State] within 7 days after notification of the diagnosis.” Id. § 453A.240.

Nevada’s law governing the medical use of marijuana does not purport to “legalize” medical marijuana, but rather specifies the limited circumstances under which the possession of limited amounts of marijuana for medical use is exempt from state prosecution. This fact is evidenced by the overall structure of the statute, as well as by the act’s inclusion of a directive instructing the next session of the Nevada legislature to “review statistics provided by the legislative counsel bureau with respect to . . . [w]hether persons exempt from state prosecution [under] this act have been subject to federal prosecution for carrying out the activities concerning which they are exempt from state prosecution pursuant to [the act].” Act of June 14, 2001 (Assembly Bill 453), ch. 592, § 48.5. Along these lines, a one-page “Important Notice” posted on the State of Nevada’s Department of Health and Human Services, Health Division’s website advises the public that **“ISSUANCE OF A STATE OF NEVADA MEDICAL MARIJUANA REGISTRY CARD DOES NOT EXEMPT THE HOLDER FROM PROSECUTION UNDER FEDERAL LAW.”** See Nev. State Health Div., Important Notice (Feb. 12, 2009),

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produces, for a specific patient,” one or more of the following symptoms: (i) cachexia, (ii) persistent muscle spasms, (iii) seizures, (iv) severe nausea, or (v) severe pain. Id. § 453A.050.

<http://health.nv.gov/PDFs/MMP/ImportantNotice.pdf> (emphasis in original) [App.<sup>5</sup> at Tab 1]; see also Nev. State Health Div., Program Facts 2 (Feb. 12, 2009), <http://health.nv.gov/PDFs/MMP/ProgramFacts.pdf> [App. at Tab 2] (stating, in a two-page document posted on the Health Division’s website, that “[t]he Medical Marijuana law is a state law, offering protection from state law enforcement only” and that “[t]he federal government does not recognize the state law and is not bound by it”). A section of the Nevada Health Division’s website answering frequently asked questions also informs the public that cardholders cannot fill a prescription for medical marijuana at a pharmacy because “[t]he federal government classifies marijuana as a Schedule I drug, which means licensed medical practitioners cannot prescribe it.” Nev. State Health Div., Medical Marijuana, Frequently Asked Questions, No. 8, [http://health.nv.gov/MedicalMarijuana\\_FAQ.htm](http://health.nv.gov/MedicalMarijuana_FAQ.htm) (last updated Sept. 29, 2011) [App. at Tab 3]. The frequently asked questions page also specifies that a patient may withdraw from the program by submitting a written statement indicating that he or she wishes to withdraw and by returning the individual’s registry identification card. Id., No. 12.

### III. ATF’S SEPTEMBER 2011 OPEN LETTER TO FFLS

On September 21, 2011, ATF issued an “Open Letter to All Federal Firearms Licensees.” See Compl., Ex. 2-B. The Open Letter first notes that ATF “has received a number of inquiries regarding the use of marijuana for medicinal purposes and its applicability to Federal firearms laws” and that the “purpose of this open letter is to provide guidance on the issue and to assist [FFLs] in complying with Federal firearms laws and regulations.” Id. The Open Letter then observes that “[a] number of States have passed legislation allowing under State law the use or possession of marijuana for medicinal purposes” and that “some of these States issue a card authorizing the holder to use or possess marijuana under State law.” Id. The Open Letter proceeds to summarize the relevant provisions of federal law, noting (i) that “18 U.S.C.

<sup>5</sup> Pursuant to Local Rule 7-3, the United States has concurrently filed an appendix to this memorandum containing secondary materials cited herein.



§ 922(g)(3)[] prohibits any person who is an ‘unlawful user of or addicted to any controlled substance . . .’ from shipping, transporting, receiving or possessing firearms or ammunition;” (ii) that the Controlled Substances Act lists marijuana as a Schedule I controlled substance and that “there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law;” (iii) that “18 U.S.C. § 922(d)(3)[] makes it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is an unlawful user of or addicted to a controlled substance;” and (iv) that, under 27 C.F.R. § 478.11, “an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonable covers the present time.” Compl., Ex. 2-B (emphasis in original). The Open Letter then interprets these provisions to draw two conclusions: first, “any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition.” Id. Second, if an FFL is “aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then [the FFL] ha[s] ‘reasonable cause to believe’ that the person is an unlawful user of a controlled substance” and “may not transfer firearms or ammunition to the person.” Id. This conclusion holds, the Open Letter notes, even if the potential transferee answered “no” to Question 11(e) on ATF Form 4473,<sup>6</sup> which asks, “Are you an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance?” Id.; see also Compl., Ex. 2-C.

<sup>6</sup> ATF Form 4473 is a firearms transaction record that all potential purchasers are required to complete before receiving a firearm from an FFL. See 27 C.F.R. § 478.124.

1 **IV. PLAINTIFF’S COMPLAINT**

2 According to the Complaint,<sup>7</sup> Plaintiff applied for a medical marijuana registry card from  
 3 the State of Nevada in October 2010. Compl. ¶ 35. Since the age of ten, Plaintiff has  
 4 experienced severe menstrual cramps, which she describes as “sometimes debilitating, even  
 5 leading to further painful side effects, such as severe nausea and cachexia.” Compl., Ex. 1, ¶ 20.  
 6 As part of her application for a registry identification card, Plaintiff “obtained a doctor’s  
 7 recommendation for the use of medical marijuana.” Compl. ¶ 36. On May 12, 2011, Nevada  
 8 issued a registry identification card to Plaintiff. Id. ¶ 37; see also Compl., Ex. 1-B.

9 Approximately five months later, on October 4, 2011, Plaintiff visited Custom Firearms  
 10 & Gunsmithing, a federally licensed gun store in Moundhouse, Nevada, to purchase a handgun.  
 11 In order to effect the transaction, Plaintiff began to complete ATF Form 4473, but left Question  
 12 11(e) blank. See Compl., Ex. 1-C. Plaintiff alleges that her “natural inclination” was to answer  
 13 “no” to Question 11(e), but that Mr. Frederick Hauseur, IV, the store’s proprietor, informed her  
 14 that ATF had “promulgated a policy whereby any person holding a medical marijuana registry  
 15 card is automatically considered an ‘unlawful user of, or addicted to marijuana.’” Compl. ¶ 42.  
 16 She states that she decided to leave the question blank because she “holds a valid medical  
 17 marijuana registry card issued by the State of Nevada, but is clearly not an unlawful user of or  
 18 addicted to marijuana.” Id. ¶ 43. When Plaintiff provided the form to Mr. Hauseur, he informed  
 19 her that he was prohibited from selling her any firearm or ammunition. Compl., Ex. 1, ¶ 32. Mr.  
 20 Hauseur and Plaintiff had known each other for nearly a year, and Mr. Hauseur was previously  
 21 aware that Plaintiff possessed a state-issued medical marijuana registry card. Id.; Compl., Ex. 2,  
 22 ¶ 11. With that knowledge and having received notice of ATF’s Open Letter, Mr. Hauseur  
 23 determined he could not sell Plaintiff a firearm without jeopardizing his status as a FFL. Compl.,  
 24 Ex. 2, ¶ 12. Plaintiff alleges more generally that she “presently intends to acquire a functional

25 \_\_\_\_\_  
 26 <sup>7</sup> The facts alleged in Plaintiff’s Complaint are accepted as true for purposes of the United  
 27 States’s Motion to Dismiss.  
 28

handgun for use within her home for self-defense but is prevented from doing so” by federal law, as implemented by ATF. Compl. ¶ 6.

On October 18, 2011, Plaintiff filed a three-count Complaint against the United States, ATF, U.S. Attorney General Eric Holder, ATF Acting Director B. Todd Jones, and ATF Assistant Director Arthur Herbert.<sup>8</sup> In Count One, Plaintiff alleges that 18 U.S.C. § 922(g)(3), 18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and ATF’s September 2011 Open Letter violate her right to keep and bear arms under the Second Amendment. Compl. ¶¶ 46–51. In Count Two, Plaintiff alleges that these same “laws and policies” violate her Fifth Amendment right to equal protection. *Id.* ¶¶ 52–57. In Count Three, Plaintiff raises a conspiracy claim, alleging that “[t]he Defendants, and each of them, acted in concert to deprive the Plaintiff of her Second and Fifth Amendment rights by enacting and enforcing the unconstitutional laws, policies, practices and/or procedures complained of in this action.” *Id.* ¶ 59. For relief, Plaintiff seeks a declaration “that 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and derivative regulations, such as 27 C.F.R. § 478.11,” violate the Second Amendment and the Due Process Clause of the Fifth Amendment, as well as an injunction preventing the enforcement of these laws and regulations. Compl., Prayer for Relief, ¶¶ 1–3. She also seeks compensatory and punitive damages. *Id.* ¶ 4.

## ARGUMENT

### **I. PLAINTIFF’S SECOND AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED**

The Ninth Circuit has held that Congress did not violate the Second Amendment by prohibiting unlawful drug users from possessing firearms. *See United States v. Dugan*, 657 F.3d 998 (9th Cir. 2011). This binding holding applies to all unlawful drug users, even those whose marijuana use is not a crime as a matter of state law. Even if the Ninth Circuit had not already upheld 18 U.S.C. § 922(g)(3) against a Second Amendment challenge, Plaintiff’s claim against

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<sup>8</sup> Plaintiff names Defendants Holder, Jones, and Herbert in both their official and their individual capacities. A separate, contemporaneously-filed motion to dismiss by the individual defendants addresses the specific reasons why Plaintiff’s claims against these defendants in their individual capacities must fail.

that provision would still fail because it proscribes activity that falls outside the scope of the Second Amendment's protections. In any event, because prohibiting possession of firearms by unlawful drug users, including marijuana users, substantially relates to the important governmental interests in combatting violent crime and protecting public safety, 18 U.S.C. § 922(g)(3) does not violate Plaintiff's Second Amendment rights. Plaintiff's challenge to § 922(d)(3) and to ATF's interpretation of that provision in the September 2011 Open Letter similarly fails. The Second Amendment does not protect a right to sell firearms. Moreover, because § 922(g)(3)—which prohibits unlawful drug users' firearm possession—does not violate the Second Amendment, the fact that § 922(d)(3) might prevent unlawful drug users from acquiring firearms does not render that provision constitutionally suspect.

**A. As Applied to Plaintiff, 18 U.S.C. § 922(g)(3), as Implemented and Interpreted by ATF, Does Not Violate the Second Amendment.**

**1. Plaintiff's Second Amendment Challenge to § 922(g)(3) Is Foreclosed By the Ninth Circuit's Decision in Dugan.**

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In District of Columbia v. Heller, 554 U.S. 570 (2008), after determining that the Second Amendment confers an individual right to keep and bear arms, *id.* at 595, the Supreme Court held that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self defense," *id.* at 635. The Court's holding was narrow and addressed only the "core" right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 634–35 (emphasis added).

The Supreme Court also took care to note that, like other constitutional rights, the right to keep and bear arms is "not unlimited." *Id.* at 626. Although the Supreme Court declined to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," it cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding

1 prohibitions on the possession of firearms by felons and the mentally ill . . . or laws imposing  
 2 conditions and qualifications on the commercial sale of arms.” Id. at 626–27. The Court  
 3 clarified that it was “identify[ing] these presumptively lawful regulatory measures only as  
 4 examples” and that its list was not “exhaustive.” Id. at 627 n.26; see also McDonald v. City of  
 5 Chicago, 130 S. Ct. 3020, 3047 (2010).

6 Following Heller, numerous Second Amendment challenges have been raised against  
 7 § 922(g)(3), and not one has succeeded. See, e.g., United States v. Yancey, 621 F.3d 681, 683,  
 8 687 (7th Cir. 2010) (holding that § 922(g)(3) was “equally defensible” as, and analogous to, the  
 9 categorical bans described as presumptively lawful in Heller and that “Congress acted within  
 10 constitutional bounds by prohibiting illegal drug users from firearm possession because it is  
 11 substantially related to the important governmental interest in preventing violent crime”); United  
 12 States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010) (“find[ing] that § 922(g)(3) is the type of  
 13 ‘longstanding prohibition[] on the possession of firearms’ that Heller declared presumptively  
 14 lawful”); United States v. Richard, 350 F. App’x 252, 260 (10th Cir. 2009) (unpublished);  
 15 United States v. Korbe, Criminal No. 09-05, 2010 WL 2404394, at \*3–4 (W.D. Pa. June 9,  
 16 2010); United States v. Hendrix, No. 09-cr-56-bbc, 2010 WL 1372663, at \*3 (W.D. Wis. Apr. 6,  
 17 2010); see also United States v. Patterson, 431 F.3d 832, 835–36 (5th Cir. 2005) (holding, pre-  
 18 Heller, that although the Fifth Circuit recognized an individual right to bear arms, a criminal  
 19 defendant’s Second Amendment challenge to § 922(g)(3) was unavailing).<sup>9</sup>

20 <sup>9</sup> United States v. Carter, \_\_\_ F.3d \_\_\_, No. 09-5074, 2012 WL 207067 (4th Cir. Jan. 23, 2012), is  
 21 not to the contrary. There, the Fourth Circuit found that the government had failed to meet its  
 22 burden of establishing a record showing a reasonable fit between § 922(g)(3) and the  
 23 government’s important interest in public safety, and it therefore remanded to allow the  
 24 government an opportunity to substantiate the record. Carter, 2012 WL 207067, at \*7–8. In  
 25 doing so, however, the Fourth Circuit noted that the record necessary to justify § 922(g)(3) “need  
 26 not be as fulsome as that necessary to justify” other sub-sections of § 922(g) because, unlike the  
 27 other sub-sections, § 922(g)(3) “only applies to persons who are currently unlawful users or  
 28 addicts.” Id. at \*6. Indeed, the court proceeded to observe that the government’s burden on  
 remand “should not be difficult to satisfy in this case, as the government has already asserted in  
 argument several risks of danger from mixing drugs and guns” and noted that the Seventh Circuit  
 in Yancey had “identified a number of studies demonstrating ‘the connection between chronic  
 drug abuse and violent crime.’” Id. at \*7–8.

1       The Ninth Circuit similarly upheld § 922(g)(3) against a Second Amendment challenge in  
 2 Dugan. Like the other courts to have considered the issue, the Ninth Circuit found significant  
 3 Heller's language indicating that § 922(g)(1)'s prohibition on firearm possession by felons and  
 4 § 922(g)(4)'s prohibition on firearm possession by the mentally ill were presumptively lawful.  
 5 Dugan, 657 F.3d at 999. The court found that "the same amount of danger" is presented by  
 6 allowing habitual drug users to possess firearms because "[h]abitual drug users, like career  
 7 criminals and the mentally ill, more likely will have difficulty exercising self-control,  
 8 particularly when they are under the influence of controlled substances." Id. The court also  
 9 found an important distinction between § 922(g)(3) and the two prohibitions declared  
 10 presumptively lawful by Heller that actually favored § 922(g)(3)'s constitutionality—namely,  
 11 that "an unlawful drug user may regain his right to possess a firearm simply by ending his drug  
 12 abuse," whereas those individuals who have been convicted of a felony or committed to a mental  
 13 institution generally face a lifetime ban. Id. The court therefore concluded that "[b]ecause  
 14 Congress may constitutionally deprive felons and mentally ill people of the right to possess and  
 15 carry weapons, . . . Congress may also prohibit illegal drug users from possessing firearms." Id.  
 16 at 999–1000.

17       Although not evident from the face of the opinion, Dugan, like Plaintiff, possessed a  
 18 state-issued card exempting him from state prosecution for using marijuana for medical  
 19 purposes. See Brief for Appellant at 59, Dugan, 657 F.3d 998 (No. 08-10579), ECF No. 57  
 20 ("Here, Mr. Dugan was . . . licensed to grow and use medical marijuana."). Indeed, the central  
 21 argument in Dugan's Second Amendment challenge was that "millions of Americans peacefully  
 22 engage in the unlawful use of marijuana—and millions more do so legally under state medical  
 23 marijuana laws—without engaging in any behavior that would provide a legitimate basis for  
 24 excluding them from the reach of the Second Amendment." Id. at 57. The Ninth Circuit,  
 25 however, treated Dugan's status as a medical marijuana cardholder as irrelevant to his Second  
 26 Amendment claim—and rightly so. Congress has determined that marijuana "has no currently  
 27  
 28

accepted medical use in treatment in the United States,” 21 U.S.C. § 812(b)(1)(B), and has accordingly specified that it may not be validly prescribed or lawfully possessed, *id.* §§ 829, 844(a). Although several states, including Nevada, have taken a different view of marijuana’s potential medical benefits, it is well settled that Congress has authority under the Commerce Clause to criminalize marijuana possession, even if such possession is not also illegal under state law. *See Gonzales v. Raich*, 545 U.S. 1 (2005); *see also Raich v. Gonzales* (“*Raich II*”), 500 F.3d 850, 861–64 (9th Cir. 2007) (holding, on remand from the Supreme Court, that there is no Ninth Amendment or substantive due process right to use marijuana for claimed medical purposes); *Mont. Caregivers Ass’n v. United States*, \_\_ F. Supp. 2d \_\_, No. CV 11-74-M-DWM, 2012 WL 169771 (D. Mont. Jan. 20, 2012). All users of marijuana are therefore unlawful users of a controlled substance, and *Dugan*’s holding that Congress may “prohibit illegal drug users from possessing firearms” without violating the Second Amendment applies equally to them all. 657 F.3d at 999–1000; *see also United States v. Stacy*, No. 09cr3695 BTM, 2010 WL 4117276, at \*7 (S.D. Cal. Oct. 18, 2010) (noting, in the course of rejecting a Second Amendment challenge to § 922(g)(3), that “[t]he fact that this particular case involves the alleged lawful use of marijuana under state law does not have any bearing on the presumptively lawful nature of the restriction”). As such, Plaintiff’s claim that her Second Amendment rights have been violated by § 922(g)(3), as interpreted by ATF, must fail.

## 2. Unlawful Drug Users Fall Outside the Scope of the Second Amendment as Understood at the Adoption of the Bill of Rights.

Even if Plaintiff’s Second Amendment challenge to § 922(g)(3) were not foreclosed by *Dugan*, it would still fail because unlawful drug users are not within the class of law-abiding, responsible citizens historically protected by the Second Amendment. As noted earlier, *Heller*’s holding was relatively narrow, recognizing only the “core” right of “law-abiding, responsible citizens to use arms in defense of hearth and home.” 554 U.S. at 634–35 (emphasis added). Given this, as well as the Court’s recognition that categorical prohibitions on firearm possession

by felons and the mentally ill are presumptively lawful, it is clear that Heller’s determination that the Second Amendment confers an individual right to keep and bear arms cannot be misconstrued as recognizing a right for all individuals to possess firearms, no matter the circumstances. Rather, Heller’s carefully crafted articulation of the right at the core of the Second Amendment acknowledges that the Anglo-American right to arms that was incorporated into the Bill of Rights was subject to certain well-recognized exceptions.<sup>10</sup> Given the relatively recent history of federal enactments disqualifying felons and the mentally ill from possessing weapons,<sup>11</sup> Heller also teaches that “exclusions [from the right to bear arms] need not mirror limits that were on the books in 1791,” when the Second Amendment was enacted. United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); see also id. at 640 (“[Heller] tell[s] us that statutory prohibitions on the possession of weapons by some persons are proper—and . . . that the legislative role did not end in 1791. That some categorical limits are proper is part of the original meaning, leaving to the people’s elected representatives the filling in of details.”). Nevertheless, the history of the right to arms as it developed in England and the American colonies is consistent not only with the disarmament of convicted felons and the mentally ill, but also more broadly supports Congress’s authority to prohibit firearm possession by non-law-abiding citizens, including those who violate drug laws.

<sup>10</sup> It is “perfectly well settled” that the Bill of Rights embodies “certain guaranties and immunities which we had inherited from our English ancestors,” and “which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case.” Robertson v. Baldwin, 165 U.S. 275, 281 (1897). The Court similarly recognized that “[i]n incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.” Id.; see also Rutan v. Republican Party of Ill., 497 U.S. 62, 95-96 (1990) (Scalia, J., dissenting) (“The provisions of the Bill of Rights . . . did not create by implication novel individual rights overturning accepted political norms.”).

<sup>11</sup> See Skoien, 614 F.3d at 640–41 (“The first federal statute disqualifying felons from possessing firearms was not enacted until 1938 . . . . [T]he ban on possession by all felons was not enacted until 1961. . . . Moreover, legal limits on the possession of firearms by the mentally ill also are of 20th Century vintage; § 922(g)(4), which forbids possession by a person ‘who has been adjudicated as a mental defective or who has been committed to a mental institution,’ was not enacted until 1968.” (citations omitted)).



1        Heller identified the right protected by the 1689 English Declaration of Rights as “the  
 2 predecessor to our Second Amendment.” 554 U.S. at 593. This document provided, “That the  
 3 subjects which are Protestants may have arms for their defense suitable to their conditions and as  
 4 allowed by law.” Id. (quoting 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689))  
 5 (emphasis added). It is undisputed that both before and after its adoption, the English  
 6 government retained the power to disarm individuals it viewed as dangerous. Id. at 582.  
 7 Moreover, “like all written English rights,” this right to arms “was held only against the Crown,  
 8 not Parliament,” id. at 593, and thus its scope was only “as allowed by law.” Significantly, the  
 9 English Declaration of Rights did not repeal the 1662 Militia Act, which authorized lieutenants  
 10 of the militia (appointed by the King) to disarm “any person or persons” judged “dangerous to  
 11 the Peace of the Kingdome,” 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.) (emphasis added), and “was  
 12 to remain in force with only insignificant changes for many years to come,” Joyce Lee Malcolm,  
 13 To Keep and Bear Arms 123 (1994) [App. at Tab 4]; accord Patrick J. Charles, “Arms for Their  
 14 Defence”: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and  
 15 Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago, 57  
 16 Clev. State L. Rev. 351, 373, 376, 382–83, 405 (2009). Since the act was employed against  
 17 those viewed as “disaffected or dangerous,” Charles, 57 Clev. State L. Rev. at 376–78,  
 18 individuals could be disarmed without any adjudication of wrongdoing.

19        The documentary record surrounding the adoption of the Constitution similarly confirms  
 20 that the right to keep and bear arms was limited to “law-abiding and responsible” citizens. In  
 21 other words, “it is clear that the colonists, at least in some manner, carried on the English  
 22 tradition of disarming those viewed as ‘disaffected and dangerous.’” United States v. Tooley,  
 23 717 F. Supp. 2d 580, 590 (S.D. W.Va. 2010). Notably, “Heller identified as a ‘highly  
 24 influential’ ‘precursor’ to the Second Amendment the Address and Reasons of Dissent of the  
 25 Minority of the Convention of the State of Pennsylvania to Their Constituents,” which “asserted  
 26 that citizens have a personal right to bear arms ‘unless for crimes committed, or real danger of  
 27  
 28

1 public injury from individuals.” Skoien, 614 F.3d at 640 (quoting Heller, 554 U.S. at 604; 2  
 2 Bernard Schwartz, The Bill of Rights: A Documentary History 665 (1971) (emphasis added)).  
 3 “One reason for considering this proposal ‘highly influential,’ is that it represents the view of the  
 4 Anti-federalists – the folk advocating . . . for a strong Bill of Rights.” Tooley, 717 F. Supp. 2d at  
 5 590. This proposal demonstrates that, at the time the Constitution was adopted, even ardent  
 6 supporters of guaranteeing an individual right to keep and bear arms recognized that criminals  
 7 and other dangerous individuals should not enjoy its benefits. Although the Second Amendment  
 8 itself proved more “succinct[.]” than the Pennsylvania proposal, Heller, 554 U.S. at 659 (Stevens,  
 9 J., dissenting), the latter remains probative of how the Amendment’s supporters viewed the  
 10 balance between public security and the right to keep and bear arms. See id. at 605 (reaffirming  
 11 that “the Bill of Rights codified venerable, widely understood liberties”).

12 The Pennsylvania proposal, moreover, supports the view that “the right to arms does not  
 13 preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the  
 14 mentally unbalanced, are deemed incapable of virtue.” Don B. Kates & Clayton E. Cramer,  
 15 Second Amendment Limitations and Criminological Considerations, 60 Hastings L.J. 1339, 1360  
 16 (2009); see also Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-  
 17 Defense: An Analytical Framework and Research Agenda, 56 UCLA L. Rev. 1443, 1497 (2009)  
 18 (“[A]ny textual or original-meaning limitations on who possesses the right will often stem from  
 19 the perception that certain people aren’t trustworthy enough to possess firearms.”); id. at 1510  
 20 (opining that “those whose judgment is seen as compromised by mental illness, mental  
 21 retardation, or drug or alcohol addiction have historically been seen as less than full  
 22 rightholders”); Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American  
 23 Origins of Gun Control, 73 Fordham L. Rev. 487, 492 (2004); Robert E. Shalhope, The Armed  
 24 Citizen in the Early Republic, 49 Law & Contemp. Probs. 125, 130 (1986). Additional historical  
 25 support for this understanding of the right is found in nineteenth-century cases upholding state  
 26 legislation restricting firearm possession by certain classes of people perceived to be dangerous.

1 For example, the Missouri Supreme Court held in 1886 that a state law prohibiting intoxicated  
2 persons from carrying firearms did not violate the state constitutional right to keep and bear  
3 arms. State v. Shelby, 2 S.W. 468, 468–69 (Mo. 1886).

4 Courts interpreting the Second Amendment following Heller have recognized the  
5 importance of the Amendment’s historical limitations. See, e.g., Heller v. District of Columbia  
6 (“Heller II”), \_\_\_F.3d \_\_\_, 2011 WL 4551558, at \*5 (D.C. Cir. Oct. 4, 2011); United States v.  
7 Chester, 628 F.3d 673 (4th Cir. 2010). Indeed, the First Circuit recently relied, in part, on  
8 historical sources in holding that the right to keep arms does not extend to juveniles. United  
9 States v. Rene E., 583 F.3d 8, 15-16 (1st Cir. 2009), cert. denied, 130 S. Ct. 1109 (Jan. 11, 2010).  
10 The Ninth Circuit has recognized this history as well, noting that “most scholars of the Second  
11 Amendment agree that the right to bear arms was ‘inextricably . . . tied to’ the concept of a  
12 ‘virtuous citizen[ry]’ . . . and that ‘the right to bear arms does not preclude laws disarming the  
13 unvirtuous citizens (i.e. criminals).” United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir.  
14 2010) (quoting Don B. Kates, Jr., The Second Amendment: A Dialogue, 49 Law & Contemp.  
15 Probs. 143, 146 (1986)).

16 This history is sufficient to resolve Plaintiff’s challenge to § 922(g)(3). Simply put,  
17 unlawful drug users—a category that includes all marijuana users—are outside the class of “law-  
18 abiding, responsible” citizens historically protected by the Second Amendment. Because the  
19 right to keep arms does not extend to those who are actively engaged in illegal activity,  
20 § 922(g)(3), as interpreted by ATF, cannot violate the Second Amendment. See Hendrix, 2010  
21 WL 1372663, at \*3 (“Preventing criminal users of controlled substances from possessing guns is  
22 not a restriction on the values that the Second Amendment protects, which, to repeat, is the right  
23 of law-abiding citizens to possess handguns in their homes for self-protection.”).

3. **In Any Event, As Applied to Marijuana Users, 18 U.S.C. § 922(g)(3) Substantially Relates to the Important Governmental Interest in Protecting Public Safety and Combating Violent Crime.**

Even if the Court declines to reach the issue of whether unlawful drug users fell outside the scope of the Second Amendment as understood at the time of its adoption, it should still uphold § 922(g)(3), as applied to all marijuana users, because the statute easily survives heightened review. In Heller, the Supreme Court did not specify which standard of review should be applied in Second Amendment cases, other than to rule out use of rational-basis scrutiny. 554 U.S. at 628 & n.27. This question is still unsettled in the Ninth Circuit: a panel of that court recently took a step towards resolving the issue, holding that “only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment,” although declining to decide “precisely what type of heightened scrutiny applies to laws that substantially burden Second Amendment rights.” Nordyke v. King, 644 F.3d 776, 786 & n.9 (9th Cir. 2011). The Ninth Circuit has decided to rehear that case en banc, however, and the panel opinion has been stripped of precedential force. Nordyke, No. 07-15763, 2011 WL 5928130 (9th Cir. Nov. 28, 2011). The other courts of appeals that have addressed the standard-of-review issue have uniformly concluded that this type of regulation is, at most, subject to intermediate scrutiny. The Fourth Circuit, for example, recently declined to decide whether firearm possession by unlawful drug users was understood to be within the scope of the Second Amendment’s guarantee at the time of ratification, but then rejected the defendant’s claim that strict scrutiny should apply to his challenge because he purchased the guns at issue for self-defense in the home. United States v. Carter, \_\_\_ F.3d \_\_\_, No. 09-5074, 2012 WL 207067, at \*4 (4th Cir. Jan. 23, 2012). Instead, the court applied intermediate scrutiny, explaining that “[w]hile we have noted that the application of strict scrutiny is important to protect the core right of self-defense identified in Heller, that core right is only enjoyed, as Heller made clear, by ‘law-abiding, responsible citizens,’” which unlawful drug users “cannot claim to be.” Id. The court noted that it was “join[ing] the other courts of appeals that have rejected the application of strict

1 scrutiny in reviewing the enforcement of § 922(g)(3), or, for that matter, any other subsection of  
 2 § 922(g).” Id. at \*5; see also Yancey, 621 F.3d at 683 (applying intermediate scrutiny to a §  
 3 922(g)(3) challenge); cf. United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010) (applying  
 4 intermediate scrutiny to challenge to § 922(g)(8)); Heller II, 2011 WL 4551558, at \*9 (applying  
 5 intermediate scrutiny to review novel gun registration laws). Given this weight of authority,  
 6 intermediate scrutiny is the highest standard of review that should potentially apply here.

7       There can be no doubt that § 922(g)(3), as applied to marijuana users, satisfies  
 8 intermediate scrutiny. Under intermediate scrutiny, “a regulation must be substantially related to  
 9 an important governmental objective.” Stormans, Inc. v. Selecky, 586 F.3d 1109, 1134 (9th Cir.  
 10 2009). An important—indeed, compelling—governmental interest is at stake here—namely, the  
 11 government’s interest in protecting public safety and preventing violent crime. See United States  
 12 v. Salerno, 481 U.S. 739, 748, 750 (1987) (noting that the Supreme Court has “repeatedly held  
 13 that the Government’s regulatory interest in community safety can, in appropriate circumstances,  
 14 outweigh an individual’s liberty interest” and that the “[g]overnment’s general interest in  
 15 preventing crime is compelling”); Schall v. Martin, 467 U.S. 253, 264 (1984) (“The ‘legitimate  
 16 and compelling state interest’ in protecting the community from crime cannot be doubted.”); see  
 17 also Carter, 2012 WL 207067, at \*5 (“We readily conclude in this case that the government’s  
 18 interest in ‘protecting the community from crime’ by keeping guns out of the hands of dangerous  
 19 persons is an important governmental interest.”); Yancey, 621 F.3d at 684 (“The broad objective  
 20 of § 922(g)—suppressing armed violence—is without doubt an important one.”).

21       In terms of evaluating the fit between the indisputably important objectives at stake and  
 22 the prohibition in § 922(g)(3), there are several relevant considerations that affect the analysis.  
 23 First, intermediate scrutiny, “by definition, allows [the government] to paint with a broader  
 24 brush” than strict scrutiny. Peruta v. Cnty. of San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal.  
 25 2010) (internal quotation marks and citation omitted). Second, in order to advance its  
 26 compelling interests in combating crime and protecting public safety, Congress may need to  
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1 make “predictive judgments” about the risk of dangerous behavior. Turner Broad. Sys. v. FCC,  
 2 512 U.S. 622, 665 (1994). Such judgments are entitled to “substantial deference” by the courts  
 3 because Congress is “far better equipped than the judiciary” to collect, weigh, and evaluate the  
 4 relevant evidence and to formulate appropriate firearms policy in response. Id. at 665–66.  
 5 Third, “the nature and quantity of any showing required by the government ‘to satisfy heightened  
 6 judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility  
 7 of the justification raised.’” Carter, 2012 WL 207067, at \*6 (quoting Nixon v. Shrink Mo. Gov’t  
 8 PAC, 528 U.S. 377, 391 (2000)). Since it is hardly novel—and entirely plausible—that mixing  
 9 guns and drugs poses a severe risk to public safety, the government’s burden here is relatively  
 10 low. Finally, the government may carry its burden by relying on “a wide range of sources, such  
 11 as legislative text and history, empirical evidence, case law, and common sense, as  
 12 circumstances and context require.” Id.

13 All of these sources point inexorably to the conclusion that a substantial relationship  
 14 exists between § 922(g)(3) as applied to marijuana users and Congress’s goals of protecting  
 15 public safety and combatting violent crime. Congress enacted the precursor to what is now  
 16 § 922(g)(3) in the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. Congressional  
 17 action was prompted by the “increasing rate of crime and lawlessness and the growing use of  
 18 firearms in violent crime.” H.R. Rep. No. 90-1577, at 7 (1968), reprinted in 1968 U.S.C.C.A.N.  
 19 4410, 4412. To meet this growing problem, Congress banned certain classes of individuals from  
 20 receiving firearms shipped in interstate commerce based on Congress’s determination that access  
 21 to guns by those groups of people was generally contrary to the public interest. See Huddleston  
 22 v. United States, 415 U.S. 814, 824 (1974) (“The principal purpose of the federal gun control  
 23 legislation . . . was to [curb] crime by keeping ‘firearms out of the hands of those not legally  
 24 entitled to possess them because of age, criminal background, or incompetency.’” (quoting S.  
 25 Rep. No. 90-1501, at 22 (1968))). As the House manager stated during debate on the legislation:

26 [W]e are convinced that a strengthened [firearms control system] can significantly  
 27 contribute to reducing the danger of crime in the United States. No one can  
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dispute the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses from buying, owning, or possessing firearms. This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons.

114 Cong. Rec. 21657, 21784 (1968) (quoted in Huddleston, 415 U.S. at 828; Yancey, 621 F.3d at 686). Moreover, Congress evidenced a particular concern with marijuana use: “[w]hile the statute swept in users of several different categories of drugs, marijuana was the only drug specifically listed by name.” Carter, 2012 WL 207067, at \*5 (citing 82 Stat. 1213, 1220–21, which prohibited receipt of firearms by any person who is “‘an unlawful user of or addicted to marihuana or any depressant or stimulant drug . . . or narcotic drug’”).<sup>12</sup>

Significantly, Congress is not the only legislative body to draw the conclusion that guns and drugs do not mix. Rather, as the court in Yancey found significant, “many states have restricted the right of habitual drug abusers or alcoholics to possess or carry firearms.” 621 F.3d at 684.<sup>13</sup> Indeed, Nevada is among the states that have codified an analogue to § 922(g)(3); the state legislature amended a pre-existing provision in 2003 to specify that “[a] person shall not own or have in his or her possession or under his or her custody or control any firearm if the person . . . [i]s an unlawful user of, or addicted to, any controlled substance.” Nev. Rev. Stat. § 202.360(1)(c). Like § 922(g)(3), the state statute further provides that “‘controlled substance’ has the meaning ascribed to it in 21 U.S.C. § 802(6).” Id. § 202.360(3)(a). Taken together, the

<sup>12</sup> As Carter notes in recounting § 922(g)(3)’s legislative history, the “the 1968 enactment . . . contained a number of loopholes.” Id. at \*6. The provision took its current shape with the enactment of the Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 452 (1986).

<sup>13</sup> See Ala. Code § 13A-11-72(b); Ark. Code Ann. § 5-73-309(7), (8); Cal. Penal Code § 12021(a)(1); Colo. Rev. Stat. § 18-12-203(1)(e), (f); Del. Code Ann. tit. 11, § 1448(a)(3); D.C. Code § 22-4503(a)(4); Fla. Stat. § 790.25(2)(b)(1); Ga. Code Ann. § 16-11-129(b)(2)(F), (I), (J); Haw. Rev. Stat. § 134-7(c)(1); Idaho Code Ann. § 18-3302(1)(e); 720 Ill. Comp. Stat. 5/24-3.1(a)(3); Ind. Code § 35-47-1-7(5); Kan. Stat. Ann. § 21-4204(a)(1); Ky. Rev. Stat. Ann. § 237.110(4)(d), (e); Md. Code Ann., Public Safety, 5-133(b)(4), (5); Mass. Gen. Laws ch. 140, § 129B(1)(iv); Minn. Stat. § 624.713(1)(10)(iii); Mo. Rev. Stat. § 571.070(1)(1); Nev. Rev. Stat. § 202.360(1)(c); N.H. Rev. Stat. Ann. § 159:3(b)(3); N.J. Stat. Ann. § 2C:58-3(c)(2); N.C. Gen. Stat. § 14-404(c)(3); Ohio Rev. Code Ann. § 2923.13(A)(4); R.I. Gen. Laws § 11-47-6; S.C. Code Ann. § 16-23-30(A)(1); S.D. Codified Laws § 23-7-7.1(3); W. Va. Code § 61-7-7(a)(2), (3).

1 state legislation “demonstrate[s] that Congress was not alone in concluding that habitual drug  
2 abusers are unfit to possess firearms.” Yancey, 621 F.3d at 684.

3 This shared legislative judgment is amply supported by academic research and empirical  
4 studies demonstrating the heightened risk to the public safety posed by the possession of firearms  
5 by marijuana users. According to the Bureau of Justice Statistics, a 2004 survey found that  
6 “32% of state prisoners and 26% of federal prisoners said they had committed their current  
7 offense while under the influence of drugs.” Bureau of Justice Statistics, Drugs and Crime Facts,  
8 <http://bjs.ojp.usdoj.gov/content/dcf/duc.cfm> [App. at Tab 5]. Marijuana, moreover, was the most  
9 frequent drug of choice: a 2002 survey of convicted jail inmates found that marijuana was the  
10 most common drug used at the time of the offense, and similar results were found among  
11 probationers. Id. Moreover, the Office of National Drug Control Policy’s (“ONDCP’s”) arrestee  
12 drug abuse monitoring program, which collects data in 10 cities from males 18 years and older at  
13 the point of their involvement in the criminal justice system, found that “[m]arijuana was the  
14 most commonly detected drug in all of the . . . sites in 2010.” ONDCP, ADAM II 2010 Annual  
15 Report, at 20 (2010), available at [http://www.whitehouse.gov/sites/default/files/ondcp/policy-](http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/adam2010.pdf)  
16 [and-research/adam2010.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/adam2010.pdf) [App. at Tab 6]. In the ten years that ONDCP has been collecting  
17 data, “the proportion of arrestees testing positive for marijuana has never been less than 30  
18 percent of the sample in any of the current 10 sites.” Id. Indeed, “[i]n 2010, in 9 of the 10 sites,  
19 40 percent or more of the arrestees reported [marijuana] use in the prior 30 days.” Id. at 22.

20 This correlation between marijuana use and crime should be no surprise given the well-  
21 documented deleterious effects regular marijuana use has on an individual. Marijuana use is  
22 associated with impaired cognitive functioning, dependence, mental illness, and poor motor  
23 performance. See ONDCP, Fact Sheet: Marijuana Legalization, at 1 (Oct. 2010), available at  
24 [http://www.whitehouse.gov/sites/default/files/ondcp/Fact\\_Sheets/marijuana\\_legalization\\_fact\\_sh](http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/marijuana_legalization_fact_sheet_3-3-11.pdf)  
25 [eet\\_3-3-11.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/marijuana_legalization_fact_sheet_3-3-11.pdf) [App. at Tab 7]. Marijuana intoxication “can cause distorted perceptions,  
26 difficulty in thinking and problem solving,” and “[s]tudies have shown an association between  
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1 chronic marijuana use and increased rates of anxiety, depression, suicidal thoughts, and  
 2 schizophrenia.” *Id.* at 2; see also National Institute of Drug Abuse, Topics in Brief: Marijuana,  
 3 at 1 (Dec. 2011), available at [https://www.drugabuse.gov/sites/default/files/marijuana\\_3.pdf](https://www.drugabuse.gov/sites/default/files/marijuana_3.pdf)  
 4 [App. at Tab 8] (noting that marijuana can have wide-ranging effects, including impaired short  
 5 term memory, slowed reaction time and impaired motor coordination, altered judgment and  
 6 decision-making, and altered mood); *id.* at 2 (“Population studies reveal an association between  
 7 cannabis use and increased risk of schizophrenia and, to a lesser extent, depression and  
 8 anxiety.”).

9 The potential risks posed by the firearm possession of someone who uses this mind-  
 10 altering substance are clear. Moreover, nothing in these studies indicates that the effects of  
 11 marijuana that make it dangerous for a user to possess a firearm are somehow mitigated when a  
 12 doctor has indicated that “use of marijuana may mitigate the symptoms or effects of [a chronic or  
 13 debilitating medical] condition.” Nev. Rev. Stat. § 453A.210(2)(a)(2). The documented effects  
 14 of marijuana use thus corroborate the substantial relationship between § 922(g)(3) and  
 15 Congress’s goal of protecting the public’s safety. See Yancey, 621 F.3d at 685 (recognizing that  
 16 “habitual drug abusers, like the mentally ill, are more likely to have difficulty exercising self-  
 17 control, making it dangerous for them to possess deadly firearms.”).

18 In addition, the limited temporal reach of § 922(g)(3) helps ensure that it bears a  
 19 reasonable fit to the ends that it serves. Unlike most of § 922(g)’s other firearm exclusions,  
 20 which may operate as lifetime bans, § 922(g)(3) only applies to those who are currently unlawful  
 21 users. See 27 C.F.R. § 478.11 (defining “unlawful user” so that any unlawful use must have  
 22 “occurred recently enough to indicate that the individual is actively engaged in such conduct”).  
 23 Through this feature, “Congress tailored the prohibition to cover only the time period during  
 24 which it deemed such persons to be dangerous.” Carter, 2012 WL 207067, at \*7. Moreover,  
 25 § 922(g)(3) “enables a drug user who places a high value on the right to bear arms to regain that  
 26 right by parting ways with illicit drug use.” *Id.* The choice is the user’s, and nothing in the  
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1 Second Amendment “require[s] Congress to allow [the unlawful user] to simultaneously choose  
2 both gun possession and drug abuse.” Yancey, 621 F.3d at 687.

3 Especially given the “substantial deference” afforded to “predictive judgments” made by  
4 Congress in order to advance the nation’s interests, Turner Broad. Sys., 512 U.S. at 665, these  
5 sources demonstrate that § 922(g)(3), as applied to marijuana users, satisfies intermediate  
6 scrutiny. That Plaintiff has registered to use marijuana for purported medical purposes, as  
7 opposed to recreational purposes, does nothing to change the result. Plaintiff may attempt to  
8 argue that § 922(g)(3) is unconstitutional as applied to her because she is a responsible marijuana  
9 user who poses no genuine threat to public safety. But such an argument is clearly precluded by  
10 the Supreme Court’s recognition in Heller that “some categorical disqualifications are  
11 permissible” and that “Congress is not limited to case-by-case exclusions of persons who have  
12 been shown to be untrustworthy with weapons.” Skoien, 614 F.3d at 641 (emphasis added); see  
13 also Tooley, 717 F. Supp. 2d at 597 (“Section 922(g)(9) is of course overbroad in the sense that  
14 not every domestic violence misdemeanor who loses his or her right to keep and bear arms  
15 would have misused them against a domestic partner or other family member. Under  
16 intermediate scrutiny, however, the fit does not need to be perfect, but only be reasonably  
17 tailored in proportion to the important interest it attempts to further. As such, intermediate  
18 scrutiny tolerates laws that are somewhat overinclusive.” (citations omitted)); United States v.  
19 Miller, 604 F. Supp. 2d 1162, 1172 (W.D. Tenn. 2009) (“[T]he nature of the threat posed by gun  
20 violence makes narrowing the scope of gun regulation impracticable.”). Nor can Plaintiff  
21 succeed on a Second Amendment challenge by “disagree[ing] with Congress’ policy decision to  
22 link the firearms prohibition in § 922(g)(3) to the Controlled Substances Act.” Carter, 2012 WL  
23 207067, at \*8. As the Fourth Circuit recognized, “[i]n enacting § 922(g)(3), Congress could  
24 have chosen to reexamine the foundations of national drug policy and to identify precisely what  
25 kinds of drug users ought to be prohibited from possessing firearms. Instead, it opted, quite  
26 reasonably, to connect § 922(g)(3)’s prohibition on the carefully studied and regularly updated  
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list of substances contained in the Controlled Substances Act.” Id. Given that § 922(g)(3)’s means need only be reasonably tailored to its ends, this reasonable legislative judgment is entirely consistent with the Second Amendment.

In sum, a variety of sources, including legislative text and history, empirical evidence, case law, and common sense, demonstrate that § 922(g)(3), as applied to marijuana users, is substantially related to the indisputably important government interest in protecting public safety and preventing crime. It therefore satisfies the requirements of intermediate-scrutiny review, providing yet another reason why Plaintiff’s constitutional challenge to § 922(g)(3), as interpreted by ATF, must fail.

**B. As Applied to Plaintiff, 18 U.S.C. § 922(d)(3), as Implemented and Interpreted by ATF, Does Not Violate the Second Amendment.**

Given that § 922(g)(3) is consistent with the Second Amendment, Plaintiff’s challenge to § 922(d)(3), as interpreted by ATF in the September 2011 Open Letter, is similarly unavailing. First, it is important to note that § 922(d)(3)’s restriction is directed toward firearm sellers, not the putative purchaser. Nothing in Heller suggests that individuals have a right to sell firearms; indeed, Heller’s language, indicating that “nothing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms,” strongly suggests otherwise. 554 U.S. at 626–27. Along these lines, only one court to date appears to have considered a Second Amendment challenge to § 922(d)(3), and it found that there was no authority indicating that, “at the time of its ratification, the Second Amendment was understood to protect an individual’s right to sell a firearm.” United States v. Chafin, 423 F. App’x 342, 344 (4th Cir. Apr. 13, 2011) (unpublished). Additionally, the right of “law-abiding, responsible citizens to use arms in defense of hearth and home” that is at the “core” of the Second Amendment, Heller, at 634–35, “does not necessarily give rise to a corresponding right to sell a firearm,” Chafin, 423 F. App’x at 344; cf. United States v. 12 200-Foot Reels of Super 8 mm. Film, 413 U.S. 123, 128 (1973) (“We have already indicated that the protected right to possess

1 obscene material in the privacy of one's home does not give rise to a correlative right to have  
2 someone sell or give it to others."").

3 This is not to say that restrictions on the sale of firearms can never implicate Second  
4 Amendment concerns. Yet, even assuming that to be the case, § 922(d)(3) still cannot run afoul  
5 of the Second Amendment because, for all the reasons discussed above, the unlawful drug users  
6 who are precluded from acquiring firearms by the statute's operation may constitutionally be  
7 prohibited from possessing firearms. In other words, given that it is consistent with the Second  
8 Amendment for § 922(g)(3) to prohibit unlawful drug users from possessing firearm, § 922(d)(3)  
9 cannot violate the Second Amendment simply because it blocks that same group from acquiring  
10 firearms.

11 To be sure, in addition to banning the sale of firearms to individuals who are known  
12 unlawful drug users, § 922(d)(3) also prohibits the sale of firearms to individuals who the seller  
13 has reasonable cause to believe are unlawful drug users, including individuals like Plaintiff who  
14 have affirmatively registered to use marijuana. Nothing in this restriction, however, violates the  
15 Second Amendment. Those who hold state-issued medical marijuana cards are either unlawful  
16 drug users or are holding cards that serve them no purpose. Plaintiff has a choice: she can either  
17 retain her Nevada-issued medical marijuana card and forfeit the right to acquire a firearm, or she  
18 can refrain from using marijuana, return her card to the State, and regain the right to acquire a  
19 firearm. Given that Plaintiff has chosen to keep her card, it is reasonable to infer that she has  
20 done so in order to use marijuana. Having made that decision, the "Second Amendment . . . does  
21 not require Congress to allow [her] to simultaneously choose . . . gun possession." Yancey, 621  
22 F.3d at 687.<sup>14</sup> As a result, Plaintiff has failed to state a Second Amendment claim against either  
23 § 922(d)(3) or ATF's interpretation of that provision.

24 <sup>14</sup> Indeed, because Plaintiff's inability to acquire a firearm stems from her own decision to retain  
25 her medical marijuana registry card, any injury she suffers is traceable not to Defendants, but to  
26 her own decisionmaking, and is therefore insufficient to confer standing to prosecute her claims.  
27 See Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales, 468 F.3d 826, 831 (D.C.  
28 Cir. 2006) ("[S]elf-inflicted harm doesn't satisfy the basic requirements for standing."); Fire

(Footnote continued on following page.)

**II. PLAINTIFF'S RIGHT TO EQUAL PROTECTION HAS NOT BEEN VIOLATED.**

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Although this clause expressly applies only to the States, the Supreme Court has found that its protections are encompassed by the Due Process Clause of the Fifth Amendment and therefore apply to the federal government. Bolling v. Sharpe, 347 U.S. 497 (1954). Count II of the Complaint challenges §§ 922(g)(3) and 922(d)(3), as implemented and interpreted by ATF, under the equal protection component of the Due Process Clause, Compl. ¶¶52–57, but this claim is also without merit.

The equal protection component of the Due Process Clause “is essentially a direction that all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). As a result, “[t]o establish an equal protection violation, [the plaintiff] must show that she is being treated differently from similarly situated individuals.” Gonzalez-Medina v. Holder, 641 F.3d 333, 336 (9th Cir. 2011). Plaintiff’s equal protection claim appears to be premised on the theory that the United States is treating holders of medical marijuana registry cards differently from other law-abiding citizens. See Compl. ¶ 3 (alleging that “Defendants have prohibited a certain class of law-abiding, responsible citizens from exercising their right to keep and bear arms”); id. ¶ 4 (“Based on the Defendants’ interpretation of Section 922(g)(3) of the federal criminal code, the law prohibits law-abiding adults who have obtained medical marijuana cards pursuant to state law from lawfully purchasing” firearms). Yet, Plaintiff’s characterization to the contrary, the class of individuals holding state-issued medical marijuana registry cards is not similarly situated to law-abiding citizens. It is entirely reasonable for the government to infer that those individuals who have affirmatively registered to

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Equip. Mfrs. Ass’n v. Marshall, 679 F.2d 679, 682 n.5 (7th Cir. 1982) (“[P]etitioners cannot allege an injury from one of the options where they can choose another which causes them no injury”).

use marijuana on the basis of chronic medical conditions are, in fact, marijuana users. And because all users of marijuana are violating federal law, they are not similarly situated to those citizens who are not violating federal law. See Marin Alliance for Med. Marijuana v. Holder, \_\_\_ F.2d \_\_\_, 2011 WL 5914031, at \*13 (N.D. Cal. Nov. 28, 2011) (finding that those whose drug use violates the Controlled Substances Act are not similarly situated to those whose use is permitted by that law). As a result, Plaintiff's Complaint does not allege that she has been "treated differently from similarly situated individuals," Gonzalez-Medina, 641 F.3d at 336, and it therefore fails to state an equal protection claim.

**III. PLAINTIFF MAY NOT PURSUE CLAIMS FOR MONETARY RELIEF AGAINST THE UNITED STATES, ATF, OR THE INDIVIDUAL DEFENDANTS IN THEIR OFFICIAL CAPACITIES.**

To the extent that Plaintiff asserts claims against the United States for monetary relief, such claims must be dismissed, as the waiver of sovereign immunity claimed by Plaintiff does not apply to actions for money damages. In seeking monetary relief, Plaintiff does not appear to distinguish between the claims against the individual Defendants in their personal capacities and the claims against the United States, ATF, and the individual Defendants in their official capacities. See Compl. ¶¶ 50, 56 (alleging that Plaintiff has suffered damages "[a]s a direct and proximate result of the foregoing law, policy, practice and/or procedure, as enacted and promulgated by the Defendants"); ¶ 59 ("The Defendants, and each of them, acted in concert to deprive the Plaintiff of her Second and Fifth Amendment rights . . . ." (emphasis added)); ¶ 60 ("As a direct and proximate result of the Defendants' above-described actions, the Plaintiff has suffered and continues to suffer damages . . . ."). Nor does she identify the specific parties from whom she seeks "compensatory and punitive damages" in her prayer for relief. Id. at 10, ¶ 4.

The United States, as a sovereign, is immune from suit unless it has waived its immunity. Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999); Levin v. United States, 663 F.3d 1059, 1061 (9th Cir. 2011). The immunity applies regardless of whether a plaintiff sues the United States, one of its agencies, or one of its officers acting in an official capacity. See Balser

1 v. Dep't of Justice, Office of U.S. Tr., 327 F.3d 903, 907 (9th Cir. 2003) ("In sovereign  
 2 immunity analysis, any lawsuit against an agency of the United States or against an officer of the  
 3 United States in his or her official capacity is considered an action against the United States.").  
 4 In particular, the United States has not waived its sovereign immunity for damages claims based  
 5 on constitutional violations. See Dyer v. United States, 166 F. App'x 908, 909 (9th Cir. 2006)  
 6 ("To the extent [plaintiff] sought damages from the United States for allegedly violating his  
 7 constitutional rights, his claim was barred by sovereign immunity."); Hamrick v. Brusseau, 80 F.  
 8 App'x 116, 116 (D.C. Cir. 2003) ("[T]he United States has not waived sovereign immunity with  
 9 respect to actions for damages based on violations of constitutional rights by federal officials,  
 10 whether brought against the United States directly . . . or against officers sued in their official  
 11 capacities . . .") (internal citations omitted). "A waiver of the Federal Government's sovereign  
 12 immunity must be unequivocally expressed in statutory text." Lane v. Peña, 518 U.S. 187, 192  
 13 (1996).

14 Plaintiff seeks to avail herself of the waiver of sovereign immunity contained in Section  
 15 702 of the Administrative Procedure Act. Compl. ¶ 11 (alleging that the United States "is a  
 16 proper defendant in this action pursuant to 5 U.S.C. § 702"). But this waiver only applies to  
 17 constitutional claims for non-monetary relief. See 5 U.S.C. § 702 ("An action in a court of the  
 18 United States seeking relief other than monetary damages . . ." (emphasis added)); Tucson  
 19 Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1998) ("By its own terms,  
 20 § 702 does not apply to claims for 'money damages . . ."). Accordingly, all claims seeking  
 21 monetary relief from the United States, ATF, or the individual defendants in their official  
 22 capacity must be dismissed.

23 **IV. PLAINTIFF'S CONSPIRACY CLAIM AGAINST THE UNITED STATES MUST**  
 24 **BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.**

25 In addition, to the extent that Plaintiff intends to pursue a common-law conspiracy claim  
 26 against the United States, this Court should dismiss the claim for Plaintiff's failure to exhaust her  
 27  
 28

administrative remedies, as well as under the “due care” exception to the Federal Torts Claim Act’s waiver of sovereign immunity. Plaintiff asserts a claim for “conspiracy” under Nevada tort law. See Comp. §§ 58-61. Though Plaintiff’s claim is against “all Defendants,” only the United States will remain as a party to the conspiracy claim following substitution under the Federal Employees Liability Reform and Tort Compensation Act (the “Westfall Act”). As set forth in the accompanying memorandum by the individual defendants, see Memo of Individual Defendants at 13-14, under the Westfall Act, once the Attorney General or his designee certifies that an employee was acting within the scope of employment when the claim arose, the action against the employee in his or her individual capacity “shall be deemed an action against the United States . . . , and the United States shall be substituted as the party defendant.” 28 U.S.C. § 2679(d)(1). The Attorney General’s designee in this case has made this certification. See Att. A to Memo of Individual Defendants. Therefore, the only remaining party to Plaintiff’s tort claim is the United States.

This Court should dismiss the conspiracy claim for lack of subject matter jurisdiction once the United States is substituted as a party.<sup>15</sup> Under the Federal Torts Claim Act, a plaintiff cannot proceed in tort against the United States without first seeking administrative resolution of the claim. 28 U.S.C. § 2675(a). The exhaustion requirement of § 2675(a) is a jurisdictional limitation. See Wilson v. Drake, 87 F.3d 1073, 1076 (9th Cir. 1996). Here, Plaintiff does not allege that she exhausted her administrative remedies. Therefore, Plaintiff’s conspiracy claim against the United States must be dismissed for lack of subject matter jurisdiction. Id. (finding jurisdiction lacking where plaintiff failed to exhaust administrative remedies in tort claim against the United States as Westfall Act substitute). In addition, to the extent that Plaintiff’s conspiracy claim challenges the enforcement of 18 U.S.C. §§ 922(d)(3) and (g)(3) and the accompanying provisions of the Code of Federal Regulations, Plaintiff’s claim is expressly excluded from

<sup>15</sup> The fact that a claim against the United States must immediately fail following substitution under the Westfall Act does not preclude substitution. See United States v. Smith, 499 U.S. 160, 165-66 (1991); Levin v. United States, 663 F.3d 1059, 1064 (9th Cir. 2011).



coverage under the “due care” exception to the FTCA’s waiver of sovereign immunity. See 28 U.S.C. 2680(a) (preserving immunity for “[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid”).<sup>16</sup>

### CONCLUSION

For the reasons stated herein, Plaintiff’s Complaint should be dismissed in its entirety or, in the alternative, summary judgment should be entered in the favor the United States on all of Plaintiff’s claims.

Dated: February 3, 2012

Respectfully submitted,

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<sup>16</sup> Beyond the jurisdictional bar, Plaintiff’s claim must fail under Nevada tort law. In Nevada, a conspiracy requires “the commission of an underlying tort.” Boorman v. Nev. Mem’l Cremation Soc’y, Inc., 772 F. Supp. 2d 1309, 1315 (D. Nev. 2011) (citing Jordan v. State ex rel. Dep’t of Motor Vehicles & Pub. Safety, 110 P.3d 30, 51 (Nev. 2005) (per curiam), abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 181 P.3d 670, 672 n.6 (Nev. 2008)). As demonstrated herein, see supra at Argument Parts I-II, and in the individual defendants’ memorandum, neither the United States nor any of its employees have committed any actionable constitutional tort. In addition, under Nevada law, a plaintiff must prove “an explicit or tacit agreement between the tortfeasors.” Azpilcueta v. State of Nev. ex rel. Transp. Auth., 2010 WL 2871073, at \*3 (D. Nev. 2010) (citing GES, Inc. v. Corbitt, 21 P.3d 11, 15 (Nev. 2001)). Here, Plaintiff has not alleged any facts to support her conclusory assertion that the Defendants “acted in concert to deprive Plaintiff of her [constitutional] rights.” Compl. ¶ 59. The claim fails to rise above mere speculation and accordingly must be dismissed. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

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1 **PROOF OF SERVICE**

2 I, Alicia N. Ellington, Trial Attorney with the United States Department of Justice, certify  
3 that the following individuals were served with **THE UNITED STATES' MOTION TO**  
4 **DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** on this date by  
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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

S. ROWAN WILSON, an individual,  
  
Plaintiff,  
  
v.  
  
ERIC HOLDER, Attorney General of the United  
States, et al.,  
  
Defendants.

Case No. 2:11-cv-1679-GMN-(PAL)

**PLAINTIFF'S RESPONSE TO THE UNITED  
STATES' MOTION TO DISMISS OR, IN  
THE ALTERNATIVE FOR SUMMARY  
JUDGMENT, AND PLAINTIFF'S CROSS-  
MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiff S. ROWAN WILSON (the "Plaintiff") by and through her counsel Charles C. Rainey of the THE LAW FIRM OF RAINEY DEVINE, and hereby submits her OPPOSITION TO THE UNITED STATES'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT. This Opposition and Cross-motion is made and based upon the Memorandum of Points and Authorities attached hereto, the pleadings and papers on file herein, and any arguments to be had at the hearing of this matter.

DATED: March 9, 2012.

Respectfully submitted:

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## INTRODUCTION

Granting the Defendant's current motion would undermine the fundamental individual liberties guaranteed by the United States Constitution and merely serve to bolster the ignorant misperceptions and prejudices held against medical cannabis patients.

The Defendants admit to deliberately seeking to deprive all medical cannabis patients of their constitutional right to keep and bear arms. The Defendants admit that BATFE issued a letter to each and every federally licensed firearms dealer, specifically banning the sale of firearms to any person possessing a state issued medical marijuana registry card. This letter was issued without providing any notice to or consultation with medical marijuana patients. The Defendants provided no hearing to adjudicate whether the Plaintiff, or any other medical cannabis patient, was, in fact, an "unlawful user" of a controlled substance. The Defendants failed to provide any meaningful opportunity for the Plaintiff or any other medical cannabis patient to be heard on the matter. Instead, the Government simply denied the Plaintiff her constitutional rights.

The Government has taken the untenable position that even within a State like Nevada, where a patient's right to grow and use medical cannabis is guaranteed by the State's Constitution, any law-abiding holder of a state-issued medical marijuana registry card is automatically prohibited from exercising her Second Amendment rights.

The Defendants violated the Plaintiffs right to procedural due process, depriving her of her constitutional rights without any notice, hearing or opportunity to comment. The Defendants violated the Plaintiff's right to equal protection, by treating her and others with certain medical ailments differently than similarly situated persons. The Defendant violated the Plaintiff's Second Amendment rights by wrongfully categorizing her as an "unlawful user" of a controlled substance and refusing her the right to purchase or possess a firearm. Meanwhile, the very law that the Defendants seek to promulgate is itself an unconstitutional abuse of individual rights.

The facts of this case are not in dispute; and the Plaintiff is entitled to judgment as a matter of law. Therefore, the Plaintiff respectfully requests that this Court DENY the

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1 Defendants' motion to dismiss, DENY the Defendant's motion for summary judgment, and  
2 properly GRANT summary judgment for the Plaintiff.

### 3 STATEMENT OF FACTS

4 There are no material facts in dispute in this matter. The Defendants' Motion does not  
5 dispute any of the factual allegations contained in Plaintiff's Complaint. Instead, the  
6 Defendants' Motion only argues the legal conclusions reached in Plaintiff's Complaint. A  
7 statement of undisputed facts is filed concurrently herewith.

### 8 LEGAL STANDARDS

9 The Defendants' Motion purports to be a Motion to Dismiss made pursuant to Federal  
10 Rules of Civil Procedure 12(b)(1)<sup>1</sup> and 12(b)(6) and, in the alternative, a Motion for Summary  
11 Judgment made pursuant to Federal Rule of Civil Procedure 56. However, Defendants' Motion  
12 does not contain a statement of the legal standards applicable to either Rule 12(b) motions to  
13 dismiss or Rule 56 motions for summary judgment.

14 Rules 12(b)(1) and 12(b)(6) provide, respectively, that defenses of lack of subject matter  
15 jurisdiction and failure to state a claim upon which relief can be granted can be raised by  
16 motion before a responsive pleading is filed. Fed. R. Civ. Pro. 12(b). Generally, in considering a  
17 Rule 12(b)(6) motion to dismiss, the Court may only look to the face of the plaintiff's complaint  
18 and must accept all factual allegations as true and draw all reasonable inferences in favor of  
19 plaintiff. "If, on a motion under Rule 12(b)(6) . . . matters outside the pleadings are presented to  
20 and not excluded by the court, the motion must be treated as one for summary judgment  
21 under Rule 56." Fed. R. Civ. Pro. 12(d).

22 Rule 56 provides that "[a] party may move for summary judgment, identifying each  
23 claim or defense . . . on which summary judgment is sought." Fed. R. Civ. Pro. 56(a). Rule 56  
24 further provides that "[t]he court shall grant summary judgment if the movant shows that there  
25 is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
26 of law." *Id.* Material facts are only those facts "that might affect the outcome of the suit under  
27

28 <sup>1</sup> The only claim to which Rule 12(b)(1) applies is Plaintiff's conspiracy claim. As will be discussed subsequently, Plaintiff will agree to the dismissal of her conspiracy claim.

1 the governing law." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247, 106 S.Ct. 2505 (1986).  
 2 Disputes as to non-material facts and disputes as to legal questions cannot preclude summary  
 3 judgment. *See id.*

4 Here, the Defendants' Motion should be considered as a motion for summary judgment  
 5 rather than a motion to dismiss because the Defendants rely on matters outside of the  
 6 Complaint throughout the Motion. These extrinsic matters cannot be separated from the  
 7 Motion so as to allow the Court to consider the Motion under Rule 12(b). Furthermore, the  
 8 Defendants Motion does not even attempt to argue that Plaintiff's Complaint is deficient on its  
 9 face; the Motion only argues that Defendants are entitled to judgment as a matter of law based  
 10 on previous court decisions. As such, the Defendants' Motion is, for all intents and purposes, a  
 11 motion for summary judgment and not Rule 12(b)(6).

#### 12 ARGUMENT

#### 13 **I. DEFENDANTS VIOLATED PLAINTIFF'S RIGHT TO DUE PROCESS.**

14 The Fifth Amendment of the United States Constitution provides, in relevant part  
 15 that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law."  
 16 U.S. Const. Amend. V. Although the Defendants' Motion only addresses the Plaintiff's Equal  
 17 Protection claims, the Plaintiff's Complaint also sets forth both procedural and substantive due  
 18 process claims pursuant to the Fifth Amendment.

#### 19 **A. Defendants Have Violated Plaintiff's Right to Procedural Due Process by** 20 **Depriving her of a Fundamental Constitutional Right Without Any Notice,** **Hearing or Opportunity to Comment.**

21 The United States Constitution requires that whenever a governmental body acts to  
 22 injure an individual, that act must be consonant with due process of law. The minimum  
 23 procedural requirements necessary to satisfy due process depend upon the circumstances and  
 24 the interests of the parties involved. "In all cases, that kind of procedure is due process of law  
 25 which is suitable and proper to the nature of the case, and sanctioned by the established  
 26 customs and usages of the courts." *Ex Parte Wall*, 107 U.S. 265, 289 (1883).<sup>2</sup> With respect to

27 \_\_\_\_\_  
 28 <sup>2</sup> Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Comm. V. McGrath*, 341 U.S. 123, 163  
 (1951), further elaborated upon this understanding as follows:

1 action taken by administrative agencies, the Supreme Court has held that notice must be given  
 2 and a hearing must be held before a final order becomes effective. *Opp Cotton Mills v.*  
 3 *Administrator*, 312 U.S. 126, 152, 153 (1941).

4 For example, the Supreme Court has held that "due process requires an adequate  
 5 hearing before termination of welfare benefits." *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).  
 6 "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v.*  
 7 *Ordean*, 234 U.S. 385, 394 (1914). When the Constitution requires a hearing, the hearing must  
 8 be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552  
 9 (1965). Generally, these provisions require that the hearing be held before a tribunal which  
 10 meets currently prevailing standards of impartiality and a party must be given an opportunity  
 11 not only to present evidence, but also to know the claims of the opposing party and to meet  
 12 them. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950); *see also Goldberg*, 397 U.S. at 267-  
 13 268. Furthermore, those who are brought into contest with the government in a quasi-judicial  
 14 proceeding aimed at control of their activities are entitled to be fairly advised of what the  
 15 government proposes and to be heard upon the proposal before the final command is issued.  
 16 *Morgan v. United States*, 304 U.S. 1, 18-19 (1938).

17 Here, the Defendants have deprived the Plaintiff of a fundamental right without any  
 18 notice or opportunity to be heard. The Defendants have adopted and are enforcing a policy,  
 19 through their Open Letter, whereby a distinct group of individuals are automatically precluded  
 20 from exercising their fundamental rights under the U.S. Constitution based solely upon an FFLs  
 21 reasonable belief that these persons are exercising their State granted rights. As will be  
 22 discussed in more detail below, the Supreme Court recently held that the Second Amendment  
 23 includes a fundamental individual right to possess a handgun in one's home for self-defense.  
 24 *See District of Columbia v. Heller*, 128 S.Ct. 2783 (2008). The Defendants have conclusively

25  
 26 "The precise nature of the interest that has been adversely affected, the manner in  
 27 which this was done, the reasons for doing it, the available alternatives to the procedure  
 28 that was followed, the protection implicit in the office of the functionary whose conduct  
 is challenged, the balance of hurt complained of and good accomplished - these are  
 some of the considerations that must enter into the judicial judgment."

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1 determined that the mere fact that an FFL is aware a “potential transferee is in possession of a  
2 card authorizing the possession and use of marijuana under State law, then [the FFL has]  
3 ‘reasonable cause to believe’ that the person is an unlawful user of a controlled substance” and  
4 **must** deny the transfer of firearms or ammunition to that person. *Open Letter*.

5 However, as will be discussed in more detail subsequently, medical marijuana users  
6 do not fit the intended definition of “unlawful users.” Here, the Plaintiff obtained a valid state  
7 medical marijuana registry card in May of 2011, approximately four months before the  
8 Defendants issued their Open Letter. Prior to the issuance of the Open Letter, Plaintiff was not  
9 given any opportunity to comment on the policy set forth in the Open Letter. Additionally,  
10 Defendants have not even provided a post-termination procedure whereby persons who hold  
11 medical marijuana registry cards can argue that they are not “unlawful users of or addicted to”  
12 a controlled substance. While the exact number of medical marijuana users is uncertain, it is  
13 estimated that roughly 600,000 persons in the U.S. are using medical marijuana in the nine  
14 states where registration is mandatory. By virtue of their issuance and enforcement of the  
15 policy set forth in the Open Letter, the Defendants have willfully deprived a large class of U.S.  
16 citizens, including the Plaintiff, of their fundamental rights in direct violation of the procedural  
17 requirements of the Due Process Clause.

18 **B. Defendants Have Violated Plaintiff’s Right to Substantive Due Process Because**  
19 **the Government’s Interest is Outweighed by the Plaintiff’s Right to Treat her**  
20 **Medical Condition in Accordance with her Doctor’s Recommendation.**

21 The right to substantive due process concerns the right to “liberty” under the Fifth and  
22 Fourteenth Amendments. Essentially, the question of substantive due process asks whether a  
23 person is free to engage in certain conduct in the exercise of their liberty under the Due Process  
24 Clause. *See Lawrence v. Texas*, 539 U.S. 558, 564 (2003). The broad substantive reach of liberty  
25 under the Due Process Clause has been noted in a number of U.S. Supreme Court Cases. *Id.*; *see*  
26 *also Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923);  
27 *and Griswold v. Connecticut*, 381 U.S. 479 (1965). “[T]he Due Process Clause has a substantive  
28 dimension of fundamental significance in defining the rights of the person.” *Lawrence*, 539 U.S.  
at 565. “[T]he full scope of the liberty guaranteed by the Due Process Clause . . . is not a series

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1 of isolated points. . . . It is a rational continuum which, broadly speaking, includes a freedom  
 2 from all substantial arbitrary impositions and purposeless restraints." *Albright v. Oliver*, 510 U.S.  
 3 266, 287 (1994) (concurring opinion), *quoting Poe v. Ullman*, 367 U.S. 497, 543 (1961) (internal  
 4 quotations omitted).

5 The U.S. Supreme Court has found that:

6 "[Matters] involving the most intimate and personal choices a person  
 7 may make in a lifetime, choices central to personal dignity and  
 8 autonomy, are central to the liberty protected by the Fourteenth  
 9 Amendment. At the heart of liberty is the right to define one's own  
 concept of existence, of meaning, of the universe, and of the mystery of  
 personhood were they formed under compulsion of the State."

10 *Lawrence*, 539 U.S. at 574, *quoting Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S.  
 11 833 (1992). "History and tradition are the starting point but not in all cases the ending point of  
 12 the substantive due process inquiry." *Id.* at 572, *quoting County of Sacramento v. Lewis*, 523  
 13 U.S. 833, 857 (1998) (Kennedy, J., concurring). For example, in 1955 the American Law  
 14 Institute's Model Penal Code made it clear its position that criminal penalties should not be  
 15 imposed on consensual sexual relations conducted in private. *Id.* The ALI based its decision on  
 16 the grounds that: "(1) [t]he prohibitions undermined respect for the law by penalizing conduct  
 17 many people engaged in; (2) the statutes regulated private conduct not harmful to others; and  
 18 (3) the laws were arbitrarily enforced and thus invited the danger of blackmail." *Id. quoting ALI*,  
 19 Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955).

20 "In determining whether a substantive right protected by the Due Process Clause has  
 21 been violated, it is necessary to balance the liberty of the individual and the demands of  
 22 organized society." *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) *see also Mills v. Rogers*, 457  
 23 U.S. 291, 299, (1982). "[T]he ultimate question is whether sufficient justification exists for the  
 24 intrusion by the government into the realm of a person's 'liberty, dignity, and freedom.'" *Compassion in Dying v. State of Washington*, 79 F.3d 790, 799 (9<sup>th</sup> Cir. 1996), *quoting Cruzan v.*  
 25 *Director, Missouri Dept. of Health*, 497 U.S. 261, 287, 289, 110 S.Ct. 2841, 2856, 2857 (1990)  
 26 (O'Connor, J., concurring). "If the balance favors the state, then the given statute--whether it  
 27 regulates the exercise of a due process liberty interest or prohibits that exercise to some  
 28

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1 degree--is constitutional. If the balance favors the individual, then the statute--whatever its  
 2 justifications--violates the individual's due process liberty rights and must be declared  
 3 unconstitutional, either on its face or as applied." *Id.*

4 Here, the Plaintiff has a substantive right to treat her medical condition in the manner  
 5 recommended by her physician and which she and her physician agree is the best course of  
 6 treatment for her. The right to choose a course of medical treatment is one of the most  
 7 intimate and personal choices a person can make. Furthermore, the ability to choose a course  
 8 of medical treatment is central to the fundamental rights of personal dignity and autonomy.  
 9 Although the Defendants will argue that cannabis has no accepted medical value and thus is not  
 10 a treatment option available to Plaintiff, a majority of states have adopted or are in the process  
 11 of adopting legislation which recognizes the medicinal values of cannabis and legalizes its use  
 12 for the treatment of various health conditions. Currently, sixteen (16) states and the District of  
 13 Columbia have legalized the use of medical cannabis.<sup>3</sup> As of February 13, 2012, an additional  
 14 eighteen (18) states have pending legislation that would legalize the use of medicinal cannabis.<sup>4</sup>  
 15 Despite the Defendants' refusal to recognize the medical benefits of cannabis, the growing  
 16 trend indicates that physicians believe cannabis has medicinal value and the public believes  
 17 medical cannabis is a viable course of treatment. Even the Drug Enforcement Agency has  
 18 admitted that the active ingredient in marijuana, THC, is valuable for relieving nausea and  
 19 vomiting and providing pain management.<sup>5</sup> Marinol, a pharmaceutical derived from cannabis, is  
 20 available by prescription in the U.S. *Id.* The federal government even assisted in the research on  
 21 Marinol. Marinol, which has been available since 1985, was originally classified as a Schedule II  
 22 substance but was moved to Schedule III in 1999. Based upon the FDA and DEA's approval of  
 23 the use of Marinol, the argument that cannabis has no medical use is without merit. Pursuant  
 24 to the substantive liberty rights imparted by the Due Process Clause, the Defendants cannot  
 25 deny the Plaintiff her right to choose a viable course of treatment recommended by her

26  
 27 <sup>3</sup> See 16 Legal Medical Marijuana States and DC – Laws, Fees, and Possession Limits, available at  
<http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.

28 <sup>4</sup> See 18 States with Pending Legislation to Legalize Medical Marijuana (as of Mar. 8, 2012), available at  
<http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481>.

<sup>5</sup> See "Medical" Marijuana – The Facts, available at [www.justice.gov/dea/ongoing/marinol.html](http://www.justice.gov/dea/ongoing/marinol.html).

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1 physician.

2        Additionally, the same factors that militated against the criminalization private  
3 consensual sexual conduct of adults support the understanding that a person's fundamental  
4 rights should not be deprived based solely upon her use of a medical treatment prescribed by  
5 her physician. The policies adopted and implemented by the Defendants, as set forth in their  
6 Open Letter undermined respect for the law by penalizing conduct many people engage in. As  
7 noted above, it is estimated that roughly 600,000 were using medical marijuana as of January  
8 2009. The policies also regulate private conduct not harmful to others. It does not appear that  
9 there is any scientific research indicating that persons using medical marijuana are any more  
10 likely than non-users to commit any crimes, let alone gun crimes. Indeed, Defendants have cited  
11 to no evidence indicating that holders of medical marijuana registry cards are likely to commit  
12 the types of crimes the Gun Control Act seeks to prevent or any other crimes for that matter.  
13 The Defendants policies are also arbitrarily enforced and thus invited the danger of blackmail,  
14 among other things. An organized society does not require that all holders of medical marijuana  
15 registry cards be prohibited from purchasing firearms and ammunition. The Defendants have  
16 failed to show that sufficient justification exists for the intrusion by the government into the  
17 realm of Plaintiff's liberty, dignity, and freedom to follow a course of medical treatment  
18 recommended by her physician. As such, the Defendants policies violate the Plaintiff's  
19 substantive liberty interests granted by the Due Process Clause of the Fifth Amendment.

20        **II. DEFENDANTS HAVE VIOLATED PLAINTIFF'S RIGHT TO EQUAL PROTECTION BY**  
21        **TREATING HER DIFFERENTLY THAN SIMILARLY SITUATED INDIVIDUALS.**

22        The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person  
23 within its jurisdiction the equal protection of the law." This provision of the Fourteenth  
24 Amendment has been held by the United States Supreme Court to apply to the federal  
25 government by virtue of the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347  
26 U.S. 497, 74 S.Ct. 693 (1954). The equal protection component of the Due Process Clause "is  
27 essentially a direction that all persons similarly situated be treated alike." *City of Cleburne v.*  
28 *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause "keeps  
governmental decision makers from treating differently persons who are in all relevant aspects

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alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *see also Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 (9<sup>th</sup> Cir. 2002) (“The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike.”) It does not appear that any federal appellate court has yet determined whether users of drugs which are lawful pursuant to state law but unlawful pursuant to federal law are similarly situated to person who use drugs other than those prohibited by the federal law.

Here, Defendants have violated Plaintiff’s equal protection rights by treating Plaintiff differently from persons to whom she is similarly situated. The Plaintiff is similarly situated to other law-abiding citizens who are attempting to follow a course of treatment prescribed by their doctors for a chronic medical condition. Defendants attempt to argue that the class of individuals holding state-issued medical marijuana registry cards is not similarly situated to other law abiding citizens because the government may infer that holders of medical marijuana registry cards are “unlawful users of or addicted to” illegal substances. However, persons who obtain a valid state registry card by obtaining a physician’s recommendation and use medicinal marijuana solely as recommended by the physician and within the limitations of state law are fundamentally different than other unlawful drug users. Additionally, medical marijuana registry cardholders should be considered as similarly situated to users of the FDA-approved drug Marinol, which contains the same active ingredient as marijuana. It does not appear that the Defendants have issued any letters to FFLs indicating that an awareness that a person is taking Marinol is grounds for the denial of the purchase of a firearm or ammunition.

Furthermore, even if medical marijuana registry cardholders are not considered similarly situated to non-registry cardholders because of presumption that registry cardholders are violating federal law, it is undeniable that registry cardholders are similarly situated to persons using medical marijuana in states where registry is not required. Several states, such as California, have provided for the legal use of medicinal marijuana without the necessity of registering with the state or obtaining a state-issued registry identification card. The Defendants’ policy set forth in the Open Letter thus discriminates against persons who live in a state that requires a registry identification card because any knowledge of the person’s

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1 possession of that card can be used as conclusive evidence to deny their attempt to purchase  
 2 firearms and/or ammunition. Meanwhile, persons using medical marijuana in a state that does  
 3 not issue registry identification cards will avoid the policies set forth in the Open Letter simply  
 4 because their state does not issue registry identification cards. As such, the policies adopted  
 5 and promulgated by the Defendants, as set forth in the Open Letter, violate the Plaintiff's right  
 6 to equal protection.

7 **III. DEFENDANTS HAVE VIOLATED PLAINTIFF'S SECOND AMENDMENT RIGHTS.**

8 **A. Plaintiff is Not an "Unlawful User" of or "Addicted To" a Controlled Substance**  
 9 **Because Congress Did Not Intend to Include Medical Cannabis Patients in those**  
 10 **Categories.**

11 Persons holding validly issued state registry cards do not fall within the meaning of  
 12 "unlawful user of or addicted to" a controlled substance as that phrase was understood by  
 13 Congress. The Controlled Substances Act, 21 U.S.C. § 802, defines the term "addict" as "any  
 14 individual who habitually uses any narcotic drug so as to endanger the public morals, health,  
 15 safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the  
 16 power of self-control with reference to his addiction." 21 U.S.C. § 802(1). However, the  
 17 Controlled Substances Act does not define the term "unlawful user." *See* 21 U.S.C. § 802. The  
 18 ATF has adopted a regulation, codified at 27 C.F.R. § 478.11, which defines the term "unlawful  
 19 user" and which also attempts to expand the definition of "addict." However, the text and  
 20 context of the statute itself are insufficient to provide the necessary explanation for the term.  
 21 As such, it is appropriate to review the legislative history to discern the intent of the legislature.

22 Nothing in the legislative history of the Controlled Substances Act specifically addresses  
 23 whether medical cannabis patients were intended to be considered "unlawful users." However,  
 24 the prevention of crime theme that is prevalent in the legislative history of 18 U.S.C. § 922(g)  
 25 indicates that Congress did not intend for law-abiding medical cannabis patients to be included  
 26 in the definition of "unlawful user." Congress enacted the Gun Control Act in 1968 with the  
 27 explicit purpose of "provid[ing] support to Federal, State, and local law enforcement officials in  
 28 their fight against crime and violence." The Gun Control Act, Pub.L. 90-618, Sec. 101 (1968).  
 Specifically, the Act and its subsequent amendments were aimed at combating gun crimes and

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1 narcotics trafficking. To achieve this end, Congress intended to prevent drug addicts and other  
 2 criminals from having access to firearms. See e.g. 132 Cong. Rec. H1689-03 (April 9, 1986)  
 3 (“What the bill will do is make it a little harder for drug addicts, muggers, deranged individuals,  
 4 and other criminal elements to procure handguns.”). Congress has also made it very clear that  
 5 the purpose of this legislation is not to place any undue or unnecessary Federal restrictions or  
 6 burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms.  
 7 The Gun Control Act, Pub.L. 90-618, Sec. 101 (1968). As such, an interpretation of 18 U.S.C. §  
 8 922(d) and (g) that extends the firearm prohibition to lawful medical cannabis use violates  
 9 Congressional intent.

10 “The principal purpose of the federal gun control legislation . . . was to curb crime by  
 11 keeping ‘firearms out of the hands of those not legally entitled to possess them because of age,  
 12 criminal background, or incompetency.’” *Huddleston v. United States*, 415 U.S. 814, 824 (1974),  
 13 quoting S.Rep. No. 1501, 90<sup>th</sup> Cong., 2d Sess., 22 (1968). U.S. Code Cong. & Admin. News 1968,  
 14 p. 4410. Prior to amendment in 1986, subsection (g)(3) against possessing firearms or  
 15 ammunition applied to a person “who is an unlawful user of or addicted to marijuana or any  
 16 depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and  
 17 Cosmetic Act) or narcotic drug (as defined in section 473(a) of the Internal Revenue Code of  
 18 1954.” In 1986, the 99<sup>th</sup> Congress emended the language of subsection (g)(3) as part of the  
 19 Firearms Owners’ Protection Act, Pub.L. 99-308, § 102(6)(B) (H.R. 4332, 99<sup>th</sup> Congress),  
 20 removing the provision’s direct reference to “marijuana” and made subsection (g)(3) applicable  
 21 to a person “who is an unlawful user of or addicted to a controlled substance as defined in the  
 22 Controlled Substances Act.” The House Judiciary Committee Report details the purpose of this  
 23 change. Firearms Owners’ Protection Act, H.R. Rep. No. 495, 99<sup>th</sup> Cong., 2<sup>nd</sup> Sess, 1986 (Mar. 14,  
 24 1986). Congress “modernized” 18 U.S.C. § 922(g) by closing loopholes for users of new drugs  
 25 that had become prevalent in the 1980s.

26 Federal courts have not yet ruled on whether a medical marijuana patient may possess  
 27 a handgun. However, the Ninth Circuit has held that in order to sustain a conviction under 18  
 28 U.S.C. § 922(g)(3), the government must prove “that the defendant took drugs with regularity,

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1 over an extended period of time, and contemporaneously with his purchase or possession of a  
 2 firearm." *United States v. Purdy*, 264 F.3d 809, 812-813 (9<sup>th</sup> Cir. 2001). In *Purdy*, the defendant  
 3 had used cocaine, non-medicinal marijuana, and methamphetamines over the course of four  
 4 years and contemporaneously with his possession of a firearm. *Id.* at 810-11. In *United States v.*  
 5 *Williams*, 216 F.Supp.2d 568 (E.D. Va. 2002), the defendant was found to have possessed a  
 6 firearm after smoking half of a marijuana cigarette, which was also in his possession. The court  
 7 concluded that Williams was not guilty of violating 18 U.S.C. 922(g) even though he had  
 8 obviously used a controlled substance at the same time that he had possessed a firearm  
 9 because the government must prove that a defendant has a pattern of use, continuous use, or  
 10 prolonged use of a controlled substance while in possession of a firearm. *Id.* at 576. The court  
 11 concluded that the government must prove that, while in possession of a firearm, the  
 12 defendant used narcotics so frequently that his use was an addiction and in such quantities as  
 13 to lose the power of self-control and pose a danger to the public. *Id.* at 573.

14 In *Gonzalez v. Raich*, the United States Supreme Court held that application of the  
 15 Controlled Substances Act's provisions criminalizing the manufacture, distribution, or  
 16 possession of marijuana to intrastate growers and users of marijuana for medical purposes  
 17 does not violate the Commerce Clause. 545 U.S. 1, 125 S.Ct. 2195 (2005). As such, *Raich* merely  
 18 ruled on the narrow issue of whether the federal government had the power to regulate  
 19 intrastate activity under the Commerce Clause. In *United States v. Oakland Cannabis Buyer's*  
 20 *Cooperative*, the Ninth Circuit reversed an injunction of distribution of medical cannabis under  
 21 the Controlled Substances Act holding that the distributors had a medical necessity defense.  
 22 190 F.3d 1109 (1999). Although the Supreme Court ultimately reversed the Ninth Circuit, the  
 23 concurring opinion points out that "[m]ost notably, whether the defense might be available to a  
 24 seriously ill patient for whom there is no alternative means of avoiding starvation or  
 25 extraordinary suffering is a difficult issue that is not presented here." *United States v. Oakland*  
 26 *Cannabis Buyer's Cooperative*, 532 U.S. 483, 501 (2001).

27 Furthermore, the Federal Government has conceded that persons complying with state  
 28 medical marijuana laws are not "unlawful users" and Defendants are estopped from asserting

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1 otherwise. On October 19, 2009, United States Deputy Attorney General David W. Ogden issued  
 2 a memorandum to all United States attorneys in those Federal Districts where the States have  
 3 enacted medical marijuana laws entitled "Investigations and Prosecutions in States Authorizing  
 4 the Medical Use of Marijuana."<sup>6</sup> The Ogden memorandum, which was specifically issued to  
 5 Defendant B. Todd Jones, states in relevant part that the attorneys "should not focus federal  
 6 resources in [their] States on individuals whose actions are in clear and unambiguous  
 7 compliance with existing state laws providing for the medical use of marijuana." Subsequently,  
 8 then Attorney General Ashcroft relied upon the position set forth in the Ogden memorandum  
 9 to reach a stipulation and dismissal in a case filed by the County of Santa Cruz, California.  
 10 Having asserted that the federal government would no longer interfere with medical cannabis  
 11 patients who are in compliance with state medical marijuana laws in that case, the federal  
 12 government would be estopped from claiming otherwise here.

13 Additionally, the United States Supreme Court recently denied certiorari to the Oregon  
 14 case of *Willis v. Winters*, 350 Or. 299, 253 P.3d 1058 (Or. 2011). *See* Order List: 565 U.S.<sup>7</sup>. In  
 15 *Willis*, the Oregon Supreme Court found that Oregon sheriffs could not deny concealed  
 16 handgun permits to medical marijuana users despite 18 U.S.C. § 922. The Supreme Court's  
 17 decision not to review this decision indicates that the Oregon court's decision and reasoning  
 18 should stand.

19 The overwhelming majority of the evidence indicates that Plaintiff, as a holder of a  
 20 medical marijuana registry card issued by her state, is not the type of person intended to be  
 21 precluded from obtaining a firearm under 18 U.S.C. § 922(g)(3). Plaintiff is not a dangerous  
 22 criminal, but rather a woman who has suffered from chronic and debilitating pain for the last  
 23 thirty (30) years. Plaintiff cannot automatically be presumed to be an "unlawful user of or  
 24 addicted to" a controlled substance. The mere fact that the Plaintiff possesses a state issued  
 25 marijuana registry card issued by her state does not meet the government's burden of proof for  
 26 a criminal conviction yet alone a deprivation of her fundamental rights. Even if the Defendants  
 27

28 <sup>6</sup> Available at <http://blogs.usdoj.gov/blog/archives/192>.

<sup>7</sup> Available at (<http://www.supremecourt.gov/orders/courtorders/010912zor.pdf>)



1 met the required level of prove and showed that Plaintiff took illegal drugs with regularity, over  
 2 an extended period of time, and contemporaneously with her purchase or possession of a  
 3 firearm, the Defendants should be estopped from asserting their position that her registry card  
 4 deems her an “unlawful user of or addicted to marijuana” based upon the federal government’s  
 5 affirmation of the Ogden memorandum in a previous case. As such, Plaintiff should not be  
 6 considered an unlawful user of or addicted to a controlled substance.

7 **B. 18 U.S.C. § 922(g)(3) is Unconstitutional.**

8 18 USC § 922(g)(3) is an exceptionally over-broad statute that, if actually enforced to its  
 9 full effect, would preclude roughly half of adult-aged US citizens (more than one hundred fifty  
 10 million people) from possessing, purchasing, transporting or even receiving any firearm or  
 11 ammunition.<sup>8</sup> In effect, the law, if fully enforced, would deprive more than half of our adult-  
 12 aged citizens of their fundamental constitutional right to keep and bear arms. The  
 13 extraordinary breadth of this law renders it unenforceable and wholly unconstitutional.

14 18 USC § 922(g)(3) reads as follows:

15 (g) It shall be unlawful for any person—  
 16 [...]

17 (3) who is an unlawful user of or addicted to any  
 controlled substance (as defined in section 102 of the  
 Controlled Substances Act (21 USC § 802));

18 [...]

19 to ship or transport in interstate or foreign commerce, or possess  
 in or affecting commerce, any firearm or ammunition; or to  
 receive any firearm or ammunition which has been shipped or  
 transported in interstate or foreign commerce.

20 Meanwhile, 21 USC § 802(6), the law defining “controlled substances,” reads as follows:

21 The term “controlled substance” means a drug or other  
 22 substance, or immediate precursor, included in schedule I, II, III,  
 23 IV, or V of part B of this subchapter. The term does not include  
 distilled spirits, wine, malt beverages, or tobacco, as those terms

25 <sup>8</sup> See TABLE 1.1A – TYPES OF ILLICIT DRUG USE IN LIFETIME, PAST YEAR, AND PAST MONTH, compiled in 2010 by the Substance  
 Abuse and Mental Health Services Administration, available at:

26 <http://www.samhsa.gov/data/NSDUH/2k10ResultsTables/Web/HTML/Sect1peTabs1to46.htm#Tab1.1A>

27 See (states that 38,806,000 Americans had taken illicit drugs within the last twelve months and 119,508,000  
 Americans had taken illicit drugs within the last twelve months); see also 2010 UNITED STATES HEALTH REPORT, as  
 28 compiled by the National Center for Health Statistics, available at <http://www.cdc.gov/nchs/data/hus/hus10.pdf>  
 (reporting that nearly half of all persons within the United States have taken prescription drugs within the last 30  
 days).



are defined or used in subtitle E of the Internal Revenue Code of 1986.

Accordingly, under 18 USC § 922(g)(3), any person that is an “unlawful user of or addicted to” any drug within Schedules I, II, III, IV or V is prohibited from exercising his/her Second Amendment rights. Those schedules encompass not only illegal narcotics, but also ANY prescription drug and even some over the counter medicines, such as Robitussin. See 21 USC § 812; see also 21 CFR §§ 1308.01 – 1308.49.

The phrase “unlawful user of or addicted to” is disturbingly broad and fails to state with reasonable particularity the specific group of persons targeted. If carried to its extreme, the phrase could include roughly half of the US population. Even if narrowly read, the category of person includes, at the very least, thirty-eight million people,<sup>9</sup> more than twelve percent of the total United States population.

Moreover, the statutory definition of “addict,” already broadly drawn under 21 USC § 802(1), is stretched to its absolute limits through ATF regulation. Under 21 USC § 802(1), the term “addict” is defined as any individual who either (1) habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or (2) who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction. Notice that the second category of “addict” is actually quite broad and could even include persons addicted to lawfully prescribed medicines. For instance, a person taking Ritalin to treat his/her Attention Deficit Disorder would likely fall within this category. Ritalin is a physically addictive substance that may be prescribed for daily ongoing use.<sup>10</sup> If taken for a prolonged period of time, the physical addiction to Ritalin could be such that the person taking the drug is no longer able to control the addiction, thereby falling within the second category of addict, defined under 21 USC § 802(1). As evidenced by the Ritalin example above, this definition of “addict” can be very broadly interpreted to include many tens of millions of Americans who lawfully take prescribed pharmaceuticals.

<sup>9</sup> *Id.*

<sup>10</sup> Methylphenidate, the systematic name for Ritalin, is a Schedule II controlled substance, due to its high likelihood for addictive potential. See 21 CFR §§ 1308; Data reported by the DEA, and collected by IMS Health (a national prescription auditing firm) shows that as of 2000, doctors in the United States were writing approximately 11 million prescriptions for Ritalin annually.

Surprisingly, the ATF's regulations employ this much broader definition of addiction from § 802(1), then go even further to deliberately push the interpretation of the definition as far as it can go. Under 27 C.F.R. § 478.11, the term "[u]nlawful user of or addicted to any controlled substance" is defined as follows:

A person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time [...].

In the following pages, the Plaintiff will provide the analysis necessary to demonstrate that the expansive scope of 18 U.S.C. § 922(g)(3) renders it unenforceable and unconstitutional. First, the Plaintiff will highlight the deeply flawed aspects of *United States v. Dugan*, the case principally relied on by the Defendants. Second, the Plaintiff will show how existing Supreme Court case law requires that § 922(g)(3) be analyzed under a strict scrutiny analysis. Then, in applying that strict scrutiny analysis, the Plaintiff will demonstrate how the subject law falls far short of being constitutional. Finally, the Plaintiff will demonstrate how, even if this Court were to apply the lesser intermediate scrutiny, § 922(g)(3) still fails to pass constitutional muster.

#### **1. The Ninth Circuit's Opinion in *Dugan* is Wrong and Must be Overturned.**

In seeking to validate the constitutionality of § 922(g)(3), the Defendants rely heavily, almost exclusively, upon the Ninth Circuit case *United States v. Dugan*. 657 F.3d 998 (9th Cir 2011). However, *Dugan* is a deeply flawed opinion that must be overturned. Consisting of just four short paragraphs, *Dugan* makes the sweeping assertion that § 922(g)(3) is constitutional, without even bothering to examine the law under a strict scrutiny, intermediate scrutiny or even rational basis analysis. Indeed, *Dugan* provides no substantive analysis of the law's

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1 constitutionality and appears to base its entire decision upon two similarly brief and similarly  
2 flawed opinions from sister circuit courts.<sup>11</sup>

3 Meanwhile, the facts of *Dugan* are so prejudicial that they fail to provide a proper  
4 framework for analyzing the constitutionality of § 922(g)(3). In *Dugan*, the party challenging  
5 the law's constitutionality, Kevin Dugan, was arrested during a domestic violence complaint,  
6 when officers discovered an illegal marijuana "operation" in Mr. Dugan's home. Mr. Dugan was  
7 the very sort of person that § 922(g)(3) was designed for—a dangerous criminal. Based on the  
8 facts represented in the *Dugan* opinion, Kevin Dugan was possibly a wife beating, drug dealing,  
9 drug using, arms dealer. As the old saying goes: "Bad facts make bad law."

10 Indeed, § 922(g)(3) doesn't just affect the rights of the Kevin Dugans of this world; this  
11 law threatens the fundamental constitutional rights of nearly half of the U.S. population.<sup>12</sup>  
12 Even though § 922(g)(3) is intended to keep guns out of the hands of a small subset of the  
13 population, the law radically over-reaches such that it poses a substantial threat to any person  
14 who is a chronic user of any drug, from marijuana to Robitussin, a group of people that  
15 constitute anywhere from twelve percent (12%) to fifty percent (50%) of the total U.S.  
16 population. For the foregoing reasons, the *Dugan* Opinion is simply wrong and MUST be  
17 overturned.<sup>13</sup>

18 **2. The Constitutionality of 18 U.S.C. § 922(g)(3) Must be Examined Under a**  
19 **Strict Scrutiny Standard Because it Seeks to Deprive Individuals of a**  
**Fundamental Constitutional Right.**

20 In *DC v. Heller*, the Supreme Court finally made clear that the Second Amendment is a  
21 "fundamental" individual right. *District of Columbia v. Heller*, 554 US 570, 128 S. Ct. 2783, 171 L.  
22 Ed. 2d 637 (2008).<sup>14</sup> Recently considering the applicability of the Second Amendment to the  
23 States, the Supreme Court reiterated this notion in *McDonald v. City of Chicago*, where it stated

24 <sup>11</sup> *Dugan* cites to only two cases in support of its proposition that 922(g)(3) is constitutional, *U.S. v. Seay*, 620 F.3d  
25 919 (8th Cir 2010), and *U.S. v Yancey*, 621 F.3d 681 (7th Cir 2010).

26 <sup>12</sup> *Supra* note 8.

27 <sup>13</sup> The Plaintiff acknowledges and understands that, in accordance with the principle of *stare decisis*, this Court is  
somewhat limited in its ability to overturn *Dugan*. Nevertheless, in the event of any appeal of this matter, the  
28 Plaintiff will be seeking to overturn the *Dugan* decision.

<sup>14</sup> Specifically, the Court stated that "By the time of the founding [of the United States], the right to have arms had  
become fundamental for English subjects" then further states that the Second Amendment was "a codified right  
'inherited from our English ancestors,'" 128 S. Ct. 2783 (*quoting Robertson v. Baldwin*, 165 U. S. 275, 281 (1897)).

1 “[i]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to  
2 keep and bear arms among those fundamental rights necessary to our system of ordered  
3 liberty.” 130 S.Ct. 3020, 3042 (2010) (*emphasis added*).

4 Although the *Heller* court failed to state the specific standard of analysis, prior Court  
5 precedent makes clear that where the government seeks to deprive individuals of a  
6 fundamental right, as is the case with § 922 (g)(3), the constitutionality of the law must be  
7 examined under a strict scrutiny analysis, ensuring that the law is narrowly tailored to  
8 effectuate a compelling government interest and that no less restrictive means exists. *See e.g.*,  
9 *Graham v. Richardson Sailer v. Leger*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Roe v.*  
10 *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Planned Parenthood of Southeastern*  
11 *Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Clark v. Jeter*, 486  
12 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988); *United States v. Virginia*, 518 U.S. 515, 116  
13 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (*Scalia dissenting* notes that "strict scrutiny will be applied to  
14 the deprivation of whatever sort of right we consider 'fundamental.'"). “Even though the  
15 governmental purpose [may] be legitimate and substantial, that purpose cannot be pursued by  
16 means that broadly stifle fundamental personal liberties when the end can be more narrowly  
17 achieved.” *Shelton v. Tucker Carr v. Young*, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).  
18 “Where legislative abridgment of 'fundamental personal rights and liberties' is asserted, 'the  
19 courts should be astute to examine the effect of the challenged legislation.” *Id.* (*quoting*  
20 *Schneider v. State*, 308 U.S. 147, 161, 60 S.Ct. 146, 151 (1939). “Mere legislative preferences or  
21 beliefs respecting matters of public convenience may well support regulation directed at other  
22 personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital  
23 to the maintenance of democratic institutions.” *Schneider*, 308 U.S. at 161.

24 Here, 18 USC § 922(g)(3) seeks to deprive individuals of their Second Amendment right  
25 to keep and bear arms. This federal criminal statute renders it a crime for any person that is an  
26 “unlawful user of or addicted to” a “controlled substance” to possess a firearm. It is a direct  
27 attack on a fundamental constitutional right. As such, the law’s constitutionality must be  
28 examined under a strict scrutiny standard.

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3. **18 U.S.C. § 922(g)(3) is Unconstitutional, Under a Strict Scrutiny Standard, Because the Law is Not Narrowly Tailored to Satisfy a Compelling Government Interest and the Government has Far Less Restrictive Means of Achieving its Goals.**

18 USC § 922(g)(3) plainly fails to survive a strict scrutiny analysis. To survive a strict scrutiny analysis, the law must:

- (1) further a compelling government interest;
- (2) be narrowly tailored to achieve that compelling government interest; and
- (3) be the least restrictive means for achieving that compelling government interest.

*See e.g. Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Kramer v. Union Free School District*, 395 U. S. 621, 395 U. S. 627 (1969); *Griswold v. Connecticut*, 381 U.S. at 381 U. S. 485 (1965).

Section 922(d)(3) fails on prongs two and three of the above-cited test: the law is not narrowly tailored to achieve the intended government interest, nor is it the least restrictive means of achieving the intended government interest.

As noted by the Defendants, in their most recent Motion, § 922(d)(3) was drafted with the intent of keeping firearms “out of the hands of presumptively risky people.” DEF MOTION TO DISMISS, p. 3, line 24 (*quoting Dickerson v. New Banner, Inc.*, 460 U.S. 103, 112, n. 6 (1983)). At the heart of § 922(g)(3) is a desire to keep firearms out of the hands of dangerous individuals – individuals that might use guns in a dangerous manner that could harm others. However, in its attempt to deter firearm possession amongst dangerous persons, § 922(g)(3) takes a scorched earth approach, seeking to deprive Second Amendment rights to a phenomenally large contingent of the American population.

18 USC § 922(g)(3) is just too impossibly broad to survive strict scrutiny (or intermediate scrutiny for that matter). The law aims to deprive tens of millions of people of their constitutional right to keep and bear arms, just to target an infinitesimal subset of potentially dangerous individuals. Even if § 922(g)(3) was solely concerned with illicit substance abuse (which it is not) and even if we were to assume that every single person who committed a violent crime within the last year was an illicit substance abuser (which is a quantum leap of an

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1 assumption), the violent persons targeted by § 922(g)(3) would still only account for 3.2% of the  
 2 total people affected by § 922(g)(3).<sup>15</sup> This is like leveling the entire rainforest just to take  
 3 down a single tree.

4 This law seeks to deprive an extraordinary number of people of their fundamental  
 5 constitutional rights, without the remotest attempt at narrowly tailoring the scope of its  
 6 impact. As evidenced by the statistical analysis provided above and further supported by the  
 7 accompanying footnote, a basic examination of drug use and violent crime in this country  
 8 shows that this law attacks the constitutional rights of more than thirty times the number of  
 9 people that it is intended to affect. This law is flawed at its very core and must be declared  
 10 unconstitutional.

11 **4. Even Under an Intermediate Scrutiny Analysis, 18 U.S.C. § 922(g)(3) is**  
 12 **Unconstitutional Because the Expansive Scope of the Law, Covering**  
 13 **More than Half of the U.S. Population, is Not Substantially Related to**  
 14 **Any Important Government Interest.**

15 Even though the United States Supreme Court has made it clear in its opinions from  
 16 *Heller* and *McDonald* that the Second Amendment is a “fundamental” individual right, some  
 17 Circuit Courts have erroneously sought to apply an intermediate scrutiny standard in their  
 18 examinations of the constitutionality of § 922(g)(3). *See U.S. v. Seay*, 620 F.3d 919 (8th Cir 2010);  
 19 *U.S. v. Yancey*, 621 F.3d 681 (7th Cir 2010). While the fundamental nature of Second  
 20 Amendment Rights calls for and requires a strict scrutiny analysis, even when properly analyzed  
 21 under intermediate scrutiny, the law fails to pass constitutional muster.

22 To overcome intermediate scrutiny, the asserted governmental interest must be  
 23 "substantial," rather than "compelling," and the regulation adopted must “be a direct,  
 24 substantial relationship between the objective and the means chosen to accomplish the

25 <sup>15</sup> This statistic is based on a combination of two statistical sources. First, and as noted earlier, the Substance  
 26 Abuse and Mental Health Services Administration calculates that 38,806,000 Americans had taken illicit drugs  
 27 within the last twelve months. *Supra* at note 20. Second, statistics compiled by the Federal Bureau of Investigation  
 28 estimate that in that same year there were approximately 1,240,000 instances of violent crime. *See CRIME IN THE*  
 UNITED STATES, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/violent-crime>. Taken together, if we assume that each instance of violent crime was  
 committed by a separate and distinct individual, and that each and every violent assailant was an illicit drug user,  
 then only 3.2% of illicit drug users account for all violent crimes committed in the United States.

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objective." *Coral Const. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *See also Association of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 729 (9th Cir. 1994) (citing *Central Hudson Gas v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980); *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 540, 100 S.Ct. 2326, 2334-35, 65 L.Ed.2d 319 (1980). As noted by the Ninth Circuit, "[i]ntermediate scrutiny's precise contours vary slightly depending upon which constitutional right is at issue." *Jacobs v. Clark County School Dist.*, 526 F.3d 419, fn 23 (9th Cir. 2008). Neither the Ninth Circuit, nor the Supreme Court has set down a system of intermediate scrutiny as applied to Second Amendment issues.

Here, the Plaintiff does not argue or even question whether § 922(g)(3) is intended to further a "substantial" government interest. As previously noted, the underlying purpose of § 922(g)(3) is to keep firearms out of the hands of potentially dangerous people. This underlying goal is perfectly valid and addresses a genuine policy concern. However, due to the extraordinary breadth and scope of § 922(g)(3), the law fails to provide a direct, substantial relationship between the law's objective and the means chosen to accomplish that objective.

As noted earlier, § 922(g)(3) takes a scorched earth approach, seeking to deprive huge swaths of the American populace of their Second Amendment rights in an over zealous attempt to curtail gun ownership amongst a much smaller subset of individuals. The overwhelming impact of the law falls on the shoulders of non-violent, harmless individuals, depriving those individuals of a fundamental constitutional right to keep and bear arms. The law does not merely apply to thieving, violent scoundrels. As written, § 922(g)(3) prohibits the sick, the elderly<sup>16</sup>, and millions others.

Meanwhile, the law allows a specific exception for alcohol abuse. Curiously, alcoholism, a condition that is widely known to increase aggression and violent tendencies<sup>17</sup> is exempted from prosecution under § 922(g)(3). If the law were truly constructed for the purpose of

<sup>16</sup> See *supra* note 8 (90.1% of persons over the age of 65 report having taken prescription medications within the last thirty days).

<sup>17</sup> See NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM No. 38 OCTOBER 1997, available at <http://pubs.niaaa.nih.gov/publications/aa38.htm>



1 curtailing the ownership of firearms amongst potentially violent people, then why would it  
 2 provide a specific exclusion for alcoholics? In a 1997 report from the National Institute of  
 3 Health, it was noted that, as a direct effect of the consumption of alcohol, “[a]lcohol may  
 4 encourage aggression or violence by disrupting normal brain function.”<sup>18</sup> Nevertheless, §  
 5 922(g)(3), a law allegedly designed to keep firearms out of the hands of potentially dangerous  
 6 people makes no attempt to keep guns from alcoholics.

7 Meanwhile, there is no viable evidence to suggest that marijuana use is correlated with  
 8 violent crime (or any other crime beyond illegal drug use). While the Government makes a  
 9 feeble attempt to tie drug use to criminal behavior, the statistics that the Government points to  
 10 fail to take into account the large number of non-criminal drug users. The statistics cited by the  
 11 Government merely analyze the number of prison inmates who admit to having been on  
 12 narcotic substances at the time of arrest. However, those individuals account for a miniscule  
 13 fraction of the total number of drug users in the United States.

14 At the end of 2010, state and federal prison populations totaled 1,518,104. Correctional  
 15 Population in the United States, 2011. Bureau of Justice Statistics. This figure equals  
 16 approximately 0.5% of the U.S. population. *Id.*; 2010 Census. Federal prisons housed 206,968  
 17 prisoners while state prisons housed 1,311,136. The 2004 DOJ study relied upon by Defendants  
 18 indicates that 32% of state prisoners and 26% of federal prisoners committed their current  
 19 offense while under the influence of drugs.<sup>19</sup> However, only 15% of state prisoners and 14% of  
 20 federal prisoners used marijuana at the time of their offense.<sup>20</sup> Thus, approximately 196,670  
 21 state inmates and 28,975 federal inmates committed their crimes while using marijuana. This  
 22 equates to approximately 0.07% of the U.S. population having committed a crime while under  
 23 the influence of marijuana. When this number is compared with the total number of Americans  
 24 who report using marijuana, it is clear that marijuana use has no causal link to crime.  
 25 Approximately 106,232,000 Americans (or 34.4% of the total U.S. population) report having  
 26

27 <sup>18</sup> *Id.*

28 <sup>19</sup> See <http://bjs.ojp.usdoj.gov/content/dcf/duc.cfm>.

<sup>20</sup> *Id.*

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1 using marijuana in their lifetime.<sup>21</sup> Approximately 17,373,000 Americans (or 5.6% of the total  
 2 U.S. population) report having used marijuana in the past month. Thus, the number of  
 3 incarcerated persons who were using marijuana at the time of their crime equals only 0.2% of  
 4 all persons who have used marijuana and 1.2% of all persons who are habitual users of  
 5 marijuana.

6 Additionally, the 2004 DOJ study reports that violent offenders were less likely than  
 7 other offenders to have used drugs in the month prior to their offense.<sup>22</sup> The report states  
 8 "Violent offenders in State prison (50%) were less likely than drug (72%) and property (64%)  
 9 offenders to have used drugs in the month prior to their offense." *Id* at p. 1.

10 The Defendants also rely on a 2010 report by the Office of National Drug Control Policy.  
 11 However, this report is not a good indicator of any supposed link between marijuana and crime  
 12 because it only reports incidents of marijuana use in males arrested in 10 cities. Additionally,  
 13 the ONDCP is not an independent research organization but rather a cabinet level component  
 14 of the Executive Office with the stated objective of eradicating drug use. As such, any studies  
 15 conducted by the ONDCP are inherently biased.

16 There is no viable link between the use of cannabis and violent behavior; meanwhile,  
 17 there is clear and well-established evidence that alcohol is directly linked with violent behavior.  
 18 Nevertheless, 18 USC § 922(g)(3) arbitrarily precludes users of cannabis (or any other controlled  
 19 substance for that matter) from exercising their fundamental constitutional rights. Section  
 20 922(g)(3) does not provide a direct, substantial relationship between the law's objective and  
 21 the means chosen to accomplish the objective. As such, the law must be declared  
 22 unconstitutional.

23 / / /

24 / / /

25 / / /

26 / / /

27

28 <sup>21</sup> See <http://www.samhsa.gov/data/NSDUH/2k10ResultsTables/Web/HTML/Sect1peTabs1to46.htm#Tab1.1A>.

<sup>22</sup> See <http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsfp04.pdf>.

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**C. 18 U.S.C. § 922(d)(3) is Similarly Unconstitutional Under Both a Strict Scrutiny or Intermediate Scrutiny Analysis.**

18 USC § 922(d)(3), drafted as a counterpart to 18 USC § 922(g)(3), is similarly unconstitutional under both a strict and intermediate scrutiny analysis, since § 922(d)(3) is neither narrowly tailored to effect a compelling government interest, nor directly related to a substantial government interest.

18 USC § 922(d)(3) reads as follows:

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

[...]

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))

Much of the analysis devoted to § 922(g)(3) can be equally applied to § 922(d)(3), since the provisions virtually mirror each other. However, there is another distinct consideration with § 922(d)(3) – the law places an exceptional burden and liability upon firearms sellers. Unlike a ban on the sale of firearms to felons, this ban is generally difficult, if not impossible to police. A simple background check will typically reveal whether a person is a convicted felon. However, the standard imposed by § 922(d)(3), if effectively policed, would require gun sellers to conduct an extensive investigation of the private behaviors and habits of their customers (an investigation that might itself violate the privacy protections of the Constitution).

Meanwhile, the law raises a multitude of nearly unanswerable questions: To what extent is the seller required to investigate the drug habits of the buyer? If the seller knows that the buyer once took an illicit substance, is that a complete bar to any sale of a firearm? What if the instance of substance abuse was a year ago? What if it was six months ago? How long ago must the drug use be in order to allow the sale of a firearm? What if the buyer only smoked marijuana once at a party? What if the party was last week? What if the buyer is a recovered drug addict, who has relapsed numerous times? What if the last relapse was a year ago? What if the last relapse was ten years ago? Where do we draw the line?

This law is untenable, unenforceable, unconstitutional and utterly unrealistic.

/ / /

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**IV. PLAINTIFF'S PRIMARY PURPOSE IN THIS ACTION IS TO PROCURE DECLARATORY AND INJUNCTIVE RELIEF RATHER THAN MONETARY DAMAGES.**

As noted above, Plaintiff has voluntarily dismissed her claims against the Defendants in their individual capacities. Plaintiff does not dispute that 5 U.S.C § 702 does not provide for monetary damages against the United States, the ATF or the individual Defendants in their official capacities. The primary purpose of Plaintiff's Complaint is, and has always been, to obtain declaratory and injunctive relief against the Defendants. To the extent that the Prayer for Relief contained in Plaintiff's Complaint seeks monetary damages, Plaintiff agrees that 5 U.S.C § 702 does not provide for such damages. Further, based upon the Plaintiff's prior dismissal of the Defendants in their individual capacities, the Plaintiff does not object to the dismissal of her conspiracy claim. Notwithstanding the foregoing, Plaintiff does not waive her right to pursue various fees and costs associated with pursuing this case as provided for in 28 U.S.C. § 2412 and similar statutes.

**CONCLUSION**

As set forth above, there are no disputed material facts in this matter. Based upon the authorities set forth herein, Plaintiff is entitled to summary judgment on her claims for violations of the Second and Fifth Amendment against the Defendants. Plaintiff respectfully requests that Defendants' Motion be DENIED as to the Plaintiff's Second and Fifth Amendment claims and that summary judgment be GRANTED in Plaintiff's favor as to these claims.

Dated this 9<sup>th</sup> day of March 2012.

Respectfully Submitted by:

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15 **UNITED STATES DISTRICT COURT**  
16 **DISTRICT OF NEVADA**

17 S. ROWAN WILSON,

18 Plaintiff,

19 v.

20 ERIC HOLDER, Attorney General of the  
21 United States et al.,

22 Defendants.

Case No.: 2:11-CV-1679-GMN-(PAL)

23 **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE**  
24 **ALTERNATIVE, FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFF'S**  
25 **CROSS-MOTION FOR SUMMARY JUDGMENT**

26 **(HEARING REQUESTED)**  
27  
28

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## INTRODUCTION

As explained in Defendants' opening brief, Plaintiff's constitutional challenges to 18 U.S.C. §§ 922(d)(3) and (g)(3), 27 C.F.R. § 478.11, and the September 2011 Letter issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") have no merit. The Ninth Circuit's decision in United States v. Dugan squarely forecloses Plaintiff's Second Amendment claim. Even if the Court were to engage in the independent Second Amendment analysis that Plaintiff seeks, Plaintiff's claim would fail, as unlawful drug users are not within the class of law-abiding, responsible citizens historically protected by the Second Amendment, and § 922(g)(3) survives any level of scrutiny. In addition, § 922(d)(3) does not violate Plaintiff's Second Amendment rights, as there is no recognized constitutional right to sell firearms. Plaintiff's equal protection claim fails to allege a proper classification of a group against whom Defendants have discriminated. Plaintiff's responsive brief does nothing to diminish these arguments. Furthermore, Plaintiff's procedural and substantive due process claims—raised for the first time in her response—must fail, as Plaintiff cannot amend her Complaint by adding new claims in her opposition brief. Even if the Court were to address these "claims," there is no substantive due process right to use marijuana for medical purposes, and Defendants have not deprived Plaintiff of a constitutionally-protected liberty or property interest. Accordingly, this Court should dismiss this action (or enter judgment for Defendants) and deny Plaintiff's cross-motion for summary judgment.<sup>1</sup>

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<sup>1</sup> Plaintiff voluntarily dismissed her claims against the named defendants in their individual capacities. See Stipulation of Dismissal of Individual Defendants (Dkt. 14). The remaining defendants are the United States, ATF, and U.S. Attorney General Eric Holder, Acting ATF Director B. Todd Jones, and Assistant ATF Director Arthur Herbert in their official capacities.

**I. DEFENDANTS HAVE MOVED TO DISMISS UNDER RULE 12(b)(6), OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT.**

Plaintiff misconstrues the posture of Defendants' motion. Defendants moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6),<sup>2</sup> which requires dismissal if the Complaint fails to state a claim upon which relief can be granted. See Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). As argued in Section I.A.1 of Defendants' Motion, Plaintiff's Second Amendment claim should be dismissed under United States v. Dugan because it fails to state a claim, even assuming the facts alleged in the Complaint are true. The Court need not reach any other arguments to dismiss the Second Amendment claim. However, in Sections I.A.2 and I.A.3 of the Motion, Defendants argued that the Second Amendment claim should be dismissed because unlawful drug users fall outside the scope of the Second Amendment as understood at the adoption of the Bill of Rights, and that § 922(g)(3) survives intermediate scrutiny. See Memorandum in Support of the United States's Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Def. Mot.") at 15-27 (Dkt. 10). In the course of that argument, Defendants presented some extrinsic sources that the Court may consider, such as a government report on the association between cognitive functioning and marijuana use. If the Court determines that it can only dismiss the Complaint by relying on those extrinsic sources, then the Court should treat Defendants' motion as a Motion for Summary Judgment under Rule 56. To facilitate that, Defendants attached to their motion a Statement of Undisputed Facts in compliance with Local Rule 56-1.

Rather than responding to Defendants' Rule 56 Statement, Plaintiff baldly asserts that Defendants failed to dispute the factual allegations in the Complaint, and then submits her own Rule 56 statement (Dkt. 17-1). This Statement should be rejected. The majority of the asserted

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<sup>2</sup> Defendants also moved to dismiss the common law conspiracy claim for lack of subject matter jurisdiction under Rule 12(b)(1). Plaintiff has agreed to dismiss the conspiracy claim in its entirety. See Plaintiff's Response to the United States' Motion to Dismiss or, in the Alternative for Summary Judgment, and Plaintiff's Cross-Motion for Summary Judgment ("Pl's Op."), at 2, 25 (Dkt. 17).

“facts” in the Statement fail to comply with Local Rule 56-1’s requirement that each material fact contain a citation to the “particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies.” See Dkt. 17-1, ¶¶ 1-28. The Statement also contains multiple conclusions of law, which do not qualify as “facts.” See, e.g., id. at ¶ 29 (“No evidence exists that Ms. Wilson has ever been an ‘an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance’ and Plaintiff maintains that she is not an unlawful user of or addicted to marijuana or any other controlled substance.”); see also ¶¶ 2, 16, 42. In any event, Plaintiff’s Statement essentially restates the allegations in her Complaint. To be clear, the facts alleged in Plaintiff’s Complaint are accepted as true for purposes of the Motion to Dismiss only. See Def. Mot. at 10 n.7. Defendants dispute many facts in the Complaint, but those disputes are immaterial to the arguments being raised before the Court in Defendants’ Motion.

## **II. PLAINTIFF HAS NOT ESTABLISHED A SECOND AMENDMENT VIOLATION**

### **A. United States v. Dugan, Which Is Controlling, Requires Dismissal of Plaintiff’s Second Amendment Claim.**

Plaintiff’s Second Amendment claim is foreclosed by United States v. Dugan, 657 F.3d 998 (9th Cir. 2011). There, the Ninth Circuit upheld § 922(g)(3) against a Second Amendment challenge, holding that “[b]ecause Congress may constitutionally deprive felons and mentally ill people of the right to possess and carry weapons, . . . Congress may also prohibit illegal drug users from possessing firearms.” Id. at 999-1000. Dugan, who was licensed to grow and use medical marijuana, argued that many marijuana users, including those in compliance with state medical marijuana laws, do not “engag[e] in any behavior that would provide a legitimate basis for excluding them from the reach of the Second Amendment.” See Brief for Appellant at 59, United States v. Dugan, 657 F.3d 998 (2011) (No. 08-10579), ECF No. 57. In rejecting Dugan’s challenge, the court of appeals did not distinguish between Dugan’s status as a medical marijuana cardholder and any other user of marijuana. Dugan’s holding—that the prohibition on

1 illegal drug users from possessing firearms does not violate the Second Amendment—applies  
 2 equally to all unlawful users of marijuana. See United States v. Stacy, No. 09-cr-3695, 2010 WL  
 3 4117276, at \*7 (S.D. Cal. Oct. 18, 2010) (noting, in the course of rejecting a Second Amendment  
 4 challenge to § 922(g)(3), that “[t]he fact that this particular case involves the alleged lawful use  
 5 of marijuana under state law does not have any bearing on the presumptively lawful nature of the  
 6 restriction”). Accordingly, under Dugan, Plaintiff’s Second Amendment challenge to § 922(g)(3)  
 7 must fail.

8 In response, Plaintiff argues that Dugan “is a deeply flawed opinion that must be  
 9 overturned.” Pl’s Op. at 16. Of course, Dugan is binding authority on this Court, and this Court  
 10 is not empowered to overrule the Ninth Circuit’s decision. See, e.g., Citizens for Better Forestry  
 11 v. USDA, 567 F.3d 1128, 1134 (9th Cir. 2009) (court of appeals precedent is binding on district  
 12 court). Plaintiff’s grounds for overturning Dugan—the alleged brevity of the court’s analysis and  
 13 an allegation that the “facts of Dugan are so prejudicial that they fail to provide a proper  
 14 framework for analyzing the constitutionality of § 922(g)(3)” (Pl’s Op. at 16-17)—even if true,  
 15 are not proper grounds for ignoring Ninth Circuit precedent.

16 **B. Unlawful Drug Users, Including Those Who Comply with State Medical**  
 17 **Marijuana Laws, Fall Outside the Scope of the Second Amendment.**

18 Because Dugan resolves Plaintiff’s Second Amendment claim, the Court need not  
 19 undergo an “independent” constitutional analysis of § 922(g)(3). See Town of Castle Rock,  
 20 Colo. v. Gonzales, 545 U.S. 748, 778 (2005) (longstanding doctrine of constitutional avoidance  
 21 cautions courts to avoid making unnecessary constitutional determinations). Nonetheless, were  
 22 the Court to engage in such an analysis, Plaintiff’s claim would still fail. As set forth in  
 23 Defendants’ Motion (Def. Mot. at 15-27), several courts have established a two-step approach to  
 24 Second Amendment challenges to federal statutes and regulations. See, e.g., Heller v. District of  
 25 Columbia, --- F.3d ----, 2011 WL 4551558, at \*5 (D.C. Cir. Oct. 4, 2011) (“Heller II”); Ezell v.  
 26 City of Chicago, 651 F.3d 684, 701–04 (7th Cir. 2011); United States v. Chester, 628 F.3d 673,

680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010). Under this approach, “[w]e ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny.” Heller II, 2011 WL 4551558 at \*5. Plaintiff’s claim fails both parts of the analysis, as unlawful drug users are not within the class of law-abiding, responsible citizens historically protected by the Second Amendment, and § 922(g)(3) survives the appropriate level of scrutiny.<sup>3</sup>

In the opening brief, Defendants demonstrated that unlawful drug users fall outside the scope of the Second Amendment as understood at the adoption of the Bill of Rights. Def. Mot. at 15-20. Heller recognized the “core” Second Amendment right of “law-abiding, responsible citizens to use arms in defense of hearth and home.” District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008) (emphasis added). This articulation acknowledges that the Anglo-American

<sup>3</sup> Plaintiff appears to frame her Second Amendment argument as an overbreadth challenge. See Pl.’s Op. at 16 (“[Plaintiff’s Second Amendment analysis will] demonstrate that the expansive scope of 18 U.S.C. § 922(g)(3) renders it unenforceable and unconstitutional.”); see also id. at 14 (“18 USC § 922(g)(3) is an exceptionally over-broad statute . . .”); id. (“The extraordinary breadth of this law renders it unenforceable and wholly unconstitutional.”). This is not a proper Second Amendment challenge. The overbreadth doctrine permits courts to relax the usual rules of standing in the First Amendment context and in a few other settings. Sabri v. United States, 541 U.S. 600, 609-10 (2004); see also United States v. Salerno, 481 U.S. 739, 745 (1987) (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”). Plaintiff has identified no basis on which that doctrine could be applied here. See United States v. Masciandaro, 638 F.3d 458, 474 (4th Cir. 2011) (rejecting a Second Amendment overbreadth challenge); United States v. Weaver, No. 2:09-cr-00222, 2012 WL 727488, at \*9-10 (S.D. W. Va. March 6, 2012) (finding no authority to extend the overbreadth doctrine to the Second Amendment). This is because in the Second Amendment context, “[a] person to whom a statute properly applies can’t obtain relief based on arguments that a differently situated person might present.” United States v. Skoien, 614 F.3d 638, 645 (7th Cir. 2010) (en banc) (citing Salerno, 481 U.S. at 745). Because Plaintiff cannot bring a constitutional challenge that asserts the rights of others, any argument based on the alleged “overbreadth” of § 922(g)(3) must be rejected.



right to arms incorporated into the Second Amendment excluded certain categories of individuals, including non-law-abiding citizens. Def. Mot. at 15-19. Therefore, violators of the Controlled Substances Act fall outside of the Second Amendment's scope. Plaintiff apparently does not dispute this point. She does not offer any historical analysis of the Second Amendment and effectively concedes that violators of the law are disqualified from exercising their Second Amendment rights.

**1. Federal Law Does Not Recognize “Law-Abiding” Users of Marijuana, and § 922(g)(3) Plainly Prohibits Use of Marijuana for “Medical Purposes.”**

Plaintiff instead contends that users of medical marijuana are not “unlawful users” of a controlled substance. Pl's Op. at 10-14. According to Plaintiff, “Congress did not intend for law-abiding medical cannabis patients to be included in the definition of ‘unlawful user.’” *Id.* at 10. The underlying assumption of Plaintiff's argument—indeed, the apparent central contention of her entire case—is that users of medical marijuana do not violate federal law. But there are no “law-abiding medical cannabis patients” under federal law. *See Gonzales v. Raich*, 545 U.S. 1, 27 (2005) (explaining that even if marijuana is used “for personal medical purposes on the advice of a physician,” it is still considered contraband under the CSA, which designates marijuana as contraband “for any purpose”) (emphasis in original); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) (“Whereas some other drugs can be dispensed and prescribed for medical use, . . . the same is not true for marijuana.”); *United States v. Katz*, No. 09-50619, 2010 WL 183863, at \* 1 (9th Cir. Jan. 19, 2010) (vacating pretrial detention order, which modified defendant's bond order to permit defendant to use and possess marijuana for medical purposes in compliance with California law, because it is illegal to possess marijuana under federal law); *United States v. Scarmazzo*, 554 F. Supp. 2d 1102, 1105 (E.D. Cal. 2008) (“The use of medical marijuana remains unlawful [under federal law].”).<sup>4</sup>

<sup>4</sup> Plaintiff's attempts to distinguish *Raich* and *Oakland Cannabis* fall flat. Pl's Op. at 12. *Raich* did indeed rule on whether Congress could, under the Commerce Clause, criminalize the

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Notwithstanding this well-settled law, Plaintiff contends that the legislative history of § 922(g)(3) reflects an intent to exclude medical marijuana users from the statute's reach. But the plain language of the statute is clear on its face, which means that this Court need not delve into § 922(g)(3)'s legislative history and policies, although they may still be instructive. See Suzlon Energy Ltd. v. Microsoft Corp., --- F.3d ---, No. 10-35793, 2011 WL 4537843, at \*1 (9th Cir. Oct. 3, 2011) (citing Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) (finding it "unnecessary to rely on the legislative history" when the plain language of the statute was clear, but finding it an "instructive" way to "lend support" to its holding)); Am. Rivers v. FERC, 201 F.3d 1186, 1204 (9th Cir. 1999) ("[W]e are mindful that this Court steadfastly abides by the principle that 'legislative history—no matter how clear—can't override statutory text.'") (quoting Hearn v. W. Conference of Teamsters Pension Trust Fund, 68 F.3d 301, 304 (9th Cir. 1995)).<sup>5</sup> Section 922(g)(3) references an "unlawful user of . . . any controlled substance" as

manufacture, distribution, or possession of marijuana by intrastate growers and users of marijuana for medical purposes. But in so doing, the court observed that "[b]y classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study." 545 U.S. at 14 (citing the CSA and Oakland Cannabis, 532 U.S. at 490). As for Oakland Cannabis, Plaintiff's reference to the reversed Ninth Circuit opinion, 190 F.3d 1109 (1999), and Justice Stevens's concurrence notwithstanding, the majority expressly held that marijuana cannot be prescribed for medical use under federal law. 532 U.S. at 491. Nor can Plaintiff rely on the Supreme Court's denial of certiorari from Willis v. Winters, 253 P.3d 1058 (Or. 2011). Pl's Op. at 13 ("The Supreme Court's decision not to review this decision indicates that the Oregon court's decision and reasoning should stand."). A denial of certiorari has no precedential effect, see Hopfmann v. Connolly, 471 U.S. 459, 461 (1985), and the holding of the Court—that § 922(g)(3) does not preempt a state concealed handgun licensing statute—has no bearing on this case.

<sup>5</sup> Regardless, Plaintiff draws untenable conclusions from the legislative history. Plaintiff suggests that by removing the direct reference to "marijuana" in 1986, Congress somehow sanctioned its use. As noted in Defendants' Motion (Def. Mot. at 23, n.12), Congress passed the amendment in 1986 to close a loophole and to expand the category of those prohibited. See H.R. Rep. No. 99-495, at 23 (1986) ("Current law does not include hallucinogenic drugs that were controlled by the Controlled Substances Act, including the violence-inducing drug phencyclidine

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defined by the Controlled Substances Act (CSA) (21 U.S.C. § 802). Under the terms of the CSA, marijuana “has no currently accepted medical use in treatment in the United States,” and “[t]here is a lack of accepted safety for use of [marijuana] under medical supervision.” 21 U.S.C. § 812(b)(1). Under a plain reading of the text, if an individual uses marijuana in violation of the CSA, he would qualify as an “unlawful user” under § 922(g)(3). See Stacy, 2010 WL 4117276, at \*6 (“Because § 922(g)(3) is a *federal* statute that refers to being an unlawful user of any controlled substance as defined by the *federal* Controlled Substances Act, the Court concludes that an ordinary person would understand that if he used marijuana in violation of federal law, he would qualify as an ‘unlawful user’ within the meaning of § 922(g)(3), regardless of whether he could be prosecuted under state law.” (emphasis in original)).<sup>6</sup>

## 2. The Ogden Memo Does Not Estop the Government from Treating Medical Marijuana Users as Violators of Federal Law.

In her opposition, Plaintiff erroneously attempts to invoke the equitable doctrine of judicial estoppel to contend that Defendants are estopped from arguing that persons complying with state medical marijuana laws are “unlawful users” of a controlled substance. Pl.’s Op. at 12-

(PCP), various tranquilizers, designer drugs and other substances that have been added to the schedules of controlled substances.”).

<sup>6</sup> To the extent that Plaintiff may be challenging ATF’s interpretation of the term “unlawful user,” this interpretation should be entitled to deference. “[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); Wash., Dep’t of Ecology v. U.S. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985) (finding that an agency’s reasonable interpretation of a statute is entitled to deference “even if [the court] would have reached a different result had [it] construed the statute initially”). This principle applies with particular force where, as here, “statutory construction involves reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation (depends) upon more than ordinary knowledge respecting the matters subjected to agency regulations.” S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 705 (9th Cir. 2007) (quoting Wash., Dep’t of Ecology, 752 F.2d at 1469)).

13. In doing so, Plaintiff appears to rely on the Joint Stipulation of Dismissal Without Prejudice, filed in January 2010 by the parties to another case, County of Santa Cruz et al. v. Holder et al., No. 03-1802 (N.D. Cal.), to suggest that the “Federal Government has conceded that persons complying with state medical marijuana laws are not ‘unlawful users.’” Pl’s Op. at 12.

The government has made no such concession. The stipulation in Santa Cruz incorporates a guidance memorandum issued by then-Deputy Attorney General David Ogden to U. S. Attorneys (the “Ogden Memo”), indicating that, in order to make “efficient and rational use of [the Department’s] limited investigative and prosecutorial resources,” federal prosecutors “should not,” as a general matter, “focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana”—such as “individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law,” or their caregivers who, consistent with state law, provide them with marijuana for medicinal purposes. See Ogden Mem. (attached hereto as Exhibit A), at 1-2. However, the memorandum further states that “[t]he prosecution of significant traffickers of illegal drugs, including marijuana . . . continues to be a core priority” of the Department. Id. at 1 (emphasis added). By its express terms, the memorandum “d[id] not alter in any way the Department’s authority to enforce federal law,” “d[id] not ‘legalize’ marijuana or provide a legal defense to a violation of federal law,” and did not “create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter.” Id. at 2. Instead, the memorandum made clear that it was “intended solely as a guide to the exercise of investigative and prosecutorial discretion.” Id.

Contrary to Plaintiff’s assertions, the doctrine of judicial estoppel has no application in this case.<sup>7</sup> Judicial estoppel only applies if “a party’s later position [is] ‘clearly inconsistent’

<sup>7</sup> It is unlikely that the doctrine of estoppel would apply to Defendants, given the policy questions presented here. See Heckler v. Cmty. Health Servs., Inc., 467 U.S. 51, 60 (1984) (“[I]t is well settled that the Government may not be estopped on the same terms as any other

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1 with its earlier position.” New Hampshire v. Maine, 532 U.S. 742, 749-51 (2001). As courts  
 2 have repeatedly recognized, nothing in the Ogden Memo made marijuana possession legal or  
 3 prevented the federal government from enforcing the CSA as it sees fit. See Sacramento  
 4 Nonprofit Collective v. Holder, No. 2:11-cv-02939, 2012 WL 662460, at \*9 (E.D. Cal. Feb. 28,  
 5 2012) (“A reasonable person, having read the entirety of the Ogden Memo, could not conclude  
 6 that the federal government was somehow authorizing the production and consumption of  
 7 marijuana for medical purposes. Any suggestion to the contrary defies the plain language of the  
 8 Memo.”) (quoting Montana Caregivers Ass’n, LLC v. United States, --- F.Supp.2d ---, No. CV  
 9 11-74-M-DWM, 2012 WL 169771, at \*1-2 (D. Mont. Jan. 20, 2012)); see also United States v.  
 10 Stacy, 734 F. Supp. 2d 1074, 1080-81 (S.D. Cal. 2010) (recognizing that the memo “provid[es]  
 11 ‘guidance regarding resource allocation’ and ‘does not ‘legalize’ marijuana or provide a legal  
 12 defense to a violation of federal law’”) (quoting Ogden Memo). Therefore, because the federal  
 13 government has never taken an inconsistent position on this issue, Plaintiff’s estoppel argument  
 14 should be rejected. See Marin Alliance for Medical Marijuana v. Holder, --- F. Supp. 2d ---, No.  
 15 C 11-05349-SBA, 2011 WL 5914031, at \*8-9 (N.D. Cal. Nov. 28, 2011); Sacramento Nonprofit,  
 16 2012 WL 662460, at \*8-9.<sup>8</sup>

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 22 litigant.”); New Hampshire v. Maine, 532 U.S. 742, 755 (2001) (“[B]road interests of public  
 23 policy may make it important to allow a change of positions that might seem inappropriate as a  
 matter of merely private interests.”) (citation and internal quotation marks omitted).

24 <sup>8</sup> Plaintiff can also not avail herself of the burden of proof for a criminal prosecution under  
 25 § 922(g)(3) to argue that marijuana registry cardholders are not “unlawful users” of a controlled  
 26 substance. See Pl’s Op. at 12-13 (citing United States v. Purdy, 264 F.3d 809 (9th Cir. 2001)).  
 That burden is not relevant to Plaintiff’s constitutional challenge.

**C. Under an Independent Constitutional Analysis, Section 922(g)(3) Survives the Appropriate Level of Scrutiny.**

**1. No More than Intermediate Scrutiny Should Apply.**

As set forth in Defendants' opening brief (Def. Mot. at 20-27), though the Ninth Circuit has not directly addressed the question of the appropriate level of scrutiny applicable to Second Amendment claims, other courts of appeals to reach this issue have uniformly applied intermediate scrutiny. See United States v. Carter, 669 F.3d 411, 416 (4th Cir. 2012) (applying intermediate scrutiny in evaluating challenge to § 922(g)(3)); United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010) (same); see also Marzzarella, 614 F.3d at 96-97 (applying intermediate scrutiny to challenge to § 922(k)); United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to challenge to § 922(g)(8)); Heller II, 2011 WL 4551558, at \*9 (applying intermediate scrutiny to review novel gun registration laws). The weight of this authority confirms that, if Plaintiff's Second Amendment claim is to be reviewed independently by the Court, no more than intermediate scrutiny should apply.

Plaintiff contends that strict scrutiny should apply because the right protected by the Second Amendment has been held to be a fundamental right. Pl's Op. at 17-18. "The [Supreme] Court has not said, however, and it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake." Heller II, 2011 WL 4551558, at \*8 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Marzzarella, 614 F.3d at 96; United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010); and Adam Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683, 697-98, 700 (2007)). Therefore, that the Second Amendment protects rights that are "fundamental," McDonald v. City of Chicago, 130 S. Ct. 3020, 3036-42 (2010), does not mandate application of strict scrutiny to Plaintiff's claim. See Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1115-16 (S.D. Cal. 2010) (applying intermediate scrutiny to a Second Amendment challenge, as "fundamental constitutional rights are not invariably subject to strict scrutiny").

Applying intermediate scrutiny is especially appropriate in the present case. Plaintiff, as an unlawful user of a controlled substance, does not fall into the category of “law-abiding, responsible citizens” whose rights are at the core of the Second Amendment. See Carter, 669 F.3d at 416 (rejecting the application of strict scrutiny to § 922(g)(3), as “[an unlawful drug user] cannot claim to be a law-abiding citizen, and therefore his asserted Second Amendment claim cannot be a core right”); Ezell, 651 F.3d at 703 (level of scrutiny “will depend on how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right”). In addition, because Plaintiff can avoid the restriction of § 922(g)(3) by simply relinquishing her marijuana registry card and refraining from using marijuana, the severity of the restriction is not particularly substantial. See Heller II, 2011 WL 4551558, at \*9 (“[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.”); Yancey, 621 F.3d at 687-688 (“[A]s § 922(g)(3) prohibits only current drug users from possessing firearms, it is far less restrictive than [the 1968 Act’s] provision affecting felons and the mentally ill.”) (emphasis in original).

**2. Section 922(g)(3) Substantially Relates to the Important Government Interest in Protecting Public Safety and Combating Violent Crime.**

Under intermediate scrutiny, “a regulation must be substantially related to an important governmental objective.” Stormans, Inc. v. Selecky, 586 F.3d 1109, 1134 (9th Cir. 2009). Applying intermediate scrutiny, the law restricting the possession of firearms by unlawful drug users relates substantially to the important government objective of reducing violent crime and protecting public safety. See Def. Mot. at 20-27.

Plaintiff concedes that § 922(g)(3) is intended to further a “substantial government interest” in “keep[ing] firearms out of the hands of potentially dangerous people.” Pl’s Op. at 21. Indeed, the Supreme Court has characterized the relevant interest as “compelling.” Salerno, 481 U.S. at 750; Schall v. Martin, 467 U.S. 253, 264 (1984). However, Plaintiff contends that

the law fails to provide a direct, substantial relationship between the objective and the chosen means. Plaintiff is incorrect. In the Defendants' opening brief (Def. Mot. at 22-27), Defendants presented a wide range of sources supporting the conclusion that a substantial relationship exists between § 922(g)(3) as applied to drug users and Congress's goal of protecting public safety and combating violent crime, including the legislative history of § 922(g)(3), similar state restrictions, and academic and empirical studies. In addition, the limited temporal scope of the statute—tailoring the restriction to current unlawful users—ensures that the statute bears a reasonable fit to the end it serves. See Carter, 669 F.3d at 419; Yancey, 621 F.3d at 687 (“[T]he Second Amendment . . . does not require Congress to allow [an unlawful user] to simultaneously choose both gun possession and drug abuse.”). In response, Plaintiff makes three primary arguments as to why § 922(g)(3) is not substantially related to the government interest in protecting public safety, each of which is baseless.

First, Plaintiff contends that § 922(g)(3) bears no substantial relationship to its end because of the statute's “extraordinary breadth and scope.” Pl's Op. at 21-22. According to Plaintiff, “[t]he overwhelming impact of the law falls on the shoulders of non-violent, harmless individuals.” Id. at 21. However, the fact that certain individuals who may theoretically pose a lesser threat to public safety fall within the ambit of § 922(g)(3) does not render the statute unconstitutional. This is implicit in Heller's recognition of the validity of categorical limitations on the Second Amendment's scope. 554 U.S. at 626-27, n.26; see also Skoien, 614 F.3d at 641; Tooley, 717 F. Supp. 2d at 597. Moreover, “intermediate scrutiny, by definition, permits legislative bodies to paint with a broader brush than strict scrutiny. . . . As a consequence, the degree of fit between [§ 922(g)(3)] and the well-established goal of promoting public safety need not be perfect; it must only be substantial.” Heller II, 698 F. Supp. 2d at 191 (citations and internal punctuation omitted). Plaintiff nevertheless argues that “huge swaths of the American populace” are deprived of their Second Amendment rights by § 922(g)(3) and the ATF regulation, because, according to Plaintiff, the restriction applies to all individuals who have



1 reported using marijuana at some point in their lifetime and individuals who use prescription  
 2 drugs. Pl's Op. at 21. Plaintiff misreads the statute. The vast majority of these individuals are  
 3 not restricted by § 922(g)(3). Congress tailored § 922(g)(3) by focusing on only "current" users  
 4 of controlled substances, not individuals who have admitted to using marijuana at some point in  
 5 their past. As for prescription drugs, 27 C.F.R. § 478.11 defines "unlawful user of or addicted to  
 6 any controlled substance" as the use of a controlled substance "in a manner other than as  
 7 prescribed by a licensed physician."<sup>9</sup> Lawful prescription drug users are therefore not "unlawful  
 8 users" of controlled substances.

9 Second, Plaintiff mistakenly contends that the fact that § 922(g)(3) does not prohibit  
 10 users or abusers of alcohol from possessing firearms renders the statute unconstitutional. This  
 11 underinclusivity argument has been expressly rejected by at least one court of appeals. See  
 12 Carter, 669 F.3d at 421 ("Carter faults § 922(g)(3) for its under-inclusiveness by targeting  
 13 irresponsible users of some mind altering substances, such as marijuana, but not users of other  
 14 substances, such as alcohol. But this argument simply amounts to a disagreement with  
 15 Congress' policy decision to link the firearms prohibition in § 922(g)(3) to the Controlled  
 16 Substances Act, 21 U.S.C. § 802."). Additionally, the underinclusivity doctrine applies primarily  
 17 in the First Amendment context, and Plaintiff cites no authority for the proposition that the  
 18 doctrine should apply to her claim. Because it is used in strict scrutiny analysis, the First  
 19 Amendment underinclusivity doctrine is a poor fit to the Second Amendment issue here. See  
 20 United States v. Virginia, 518 U.S. 515, 573 (1996) (Scalia, J., dissenting) ("Intermediate  
 21 scrutiny has never required a least-restrictive-means analysis, but only a 'substantial relation'  
 22 between the classification and the state interests that it serves."). Furthermore, because the  
 23 doctrine's purpose is to prevent "governmental attempt[s] to give one side of a debatable public  
 24 question an advantage in expressing its views to the people" or government attempts to "select

25 <sup>9</sup> As noted, marijuana, a Schedule I drug, cannot be legally prescribed for medical use. See 21  
 26 U.S.C. § 829; Oakland Cannabis, 532 U.S. at 491.

the permissible subjects for public debate and thereby to control the search for political truth,” City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (internal citations and punctuation omitted), it is difficult to apply outside the First Amendment context, where content-based regulations of expression receive the most exacting scrutiny.<sup>10</sup>

Third, Plaintiff attempts to cast doubt on Congress’s determination that marijuana use is linked to crime. Pl’s Op. at 22-23 (“There is no viable link between the use of cannabis and violent behavior.”). Plaintiff’s argument is policy-based, and is intended to support her opinion that the majority of marijuana users are “non-violent, harmless individuals.” Id. at 21. Plaintiff’s contentions would be better addressed to a legislative body, as “[u]nder the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.” Ferguson v. Skrupa, 372 U.S. 726, 729 (1963); see also Turner Broad. Sys. v. FCC, 512 U.S. 622, 665-66 (1994) (noting that “Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon” complex and dynamic issues). In any event, there are sound reasons why Plaintiff’s policy arguments are not persuasive here. See Def. Mot. at 23-25.

In sum, § 922(g)(3) does not violate the Second Amendment, as it is substantially related to the compelling government interest of reducing violent crime and protecting public safety.

<sup>10</sup> Moreover, in analyzing the constitutional propriety of the limitations of a statute, courts are “guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” Buckley v. Valeo, 424 U.S. 1, 105 (1976) (internal citations and punctuation omitted); see also United States v. Lewitzke, 176 F.3d 1022, 1027 (7th Cir. 1999) (Congress did not act irrationally in imposing firearms disability solely upon persons convicted of domestic violence misdemeanors, despite the fact that “persons convicted of other sorts of misdemeanors [may] pose a danger to society if armed,” because “Congress is free to take ‘one step at a time’”); Olympic Arms v. Buckles, 301 F.3d 384, 390 (6th Cir. 2002) (rejecting argument that import ban of certain semi-automatic weapons was irrational because it prohibited firearms with more than one of four enumerated features, but allowed weapons with one of the features, because “Congress may work incrementally in protecting public safety” and its “decision first to target weapons commonly used for criminal activity or, likewise, those most heavily loaded with dangerous features is within their legislative authority”).

**III. SECTION 922(d)(3), AS APPLIED TO PLAINTIFF, DOES NOT VIOLATE THE SECOND AMENDMENT.**

Plaintiff's challenge to § 922(d)(3)'s restriction on the sale of firearms is similarly meritless. Heller neither recognized a right to sell firearms nor called into question "laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626–27. In addition, for the same reasons that the Second Amendment does not preclude Congress from forbidding unlawful drug users from possessing firearms, Congress may also forbid that same group from acquiring firearms. See Def. Mot. at 27-28; United States v. Chafin, 423 F. App'x 342, 344 (4th Cir. Apr. 13, 2011) (unpublished).

Plaintiff's only argument in rebuttal is that § 922(d)(3) allegedly "places an exceptional burden and liability upon firearms sellers" and is therefore unenforceable. Pl's Op. at 24. But Plaintiff lacks standing to challenge the burden on federal firearms licensees ("FFLs"). Kyung Park v. Holder, 572 F.3d 619, 625 (9th Cir. 2009) ("As a general rule, a third party does not [have] standing to bring a claim asserting a violation of someone else's rights.") (citation omitted). Even if she did have standing, the alleged "burden" on FFLs is irrelevant here. The only relevant burden in this case would be a burden on a constitutional right, and as stated, there is no constitutional right to sell a firearm. See Def. Mot. at 27-28; Chafin, 423 F. App'x at 344.

**IV. PLAINTIFF'S EQUAL PROTECTION CLAIM MUST FAIL.**

Plaintiff has also failed to adequately articulate an equal protection claim because users of marijuana for medical purposes are not, as Plaintiff claims, "law-abiding citizens." Pl's Op. at 9; Compl. at ¶ 3-4. In order to state an equal protection claim, Plaintiff "must show that she is being treated differently from similarly situated individuals." Gonzalez-Medina v. Holder, 641 F.3d 333, 336 (9th Cir. 2011). Despite Plaintiff's repeated assertions that she is a "law-abiding citizen," federal law does not recognize a difference between medical marijuana users and other marijuana users. See Alternative Community Health Care Co-op., Inc. v. Holder, 2012 WL 707154, at \*5 (S.D. Cal. March 5, 2012) (finding that users of marijuana for medicinal purposes

in violation of the Controlled Substances Act are not similarly situated to law-abiding citizens); see also supra at 7-9 and Def. Mot. at 5, 29-30. Because it is reasonable for the government to infer that individuals holding state-issued medical marijuana registry cards use marijuana, and because marijuana users violate federal law, Plaintiff fails to identify any similarly situated to citizens who do not violate federal law.<sup>11</sup>

Plaintiff also claims—for the first time in her opposition brief—that “registry cardholders are similarly situated to persons using medical marijuana in states where registry is not required.” Pl’s Op. at 9. Plaintiff argues that because some states allow medical marijuana use without issuing registry identification cards, some medical marijuana users will be able to buy guns more easily than people who live in states that require medical marijuana registry cards. Pl’s Op. at 10. This argument fails to state a claim and should be dismissed as well.

As an initial matter, the facts underlying this argument were not set forth in the Complaint and therefore are not properly before this Court. See Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) (noting that a court may not look beyond the complaint to plaintiff’s briefs when determining the propriety of a motion to dismiss for failure to state a claim); Ruiz v. Laguna, No. 05-CV-1871, 2007 WL 1120350, at \*26 (S.D. Cal. March 28, 2007) (“It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.”) (citation and internal quotation marks omitted). In particular, Plaintiff provides no citation or support for the bare assertion in her Opposition that “[s]everal states, such as California, have provided for the legal use of medical marijuana without the necessity of registering with the state or obtaining a state-issued registry identification card.” Pl’s Op. at 9.

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<sup>11</sup> Plaintiff also erroneously argues that she is similarly situated to “users of the FDA-approved drug Marinol, which contains the same active ingredient as marijuana.” Pl’s Op. at 9. But Marinol is not a Schedule I controlled substance under the CSA, and therefore its use with a prescription does not violate federal law.

1 Even if the Court overlooks this pleading defect, Plaintiff does not claim (because she  
 2 cannot) that the “law is applied in a discriminatory manner or imposes different burdens on  
 3 different classes of people.” Freeman v. City of Santa Ana, 68 F.3d 1180, 1187 (9th Cir. 1995).  
 4 The law applies equally to all users of medical marijuana, and nothing in § 922(g)(3), 27 C.F.R.  
 5 § 478.11, or the Open Letter suggests otherwise. Instead, Plaintiff’s argument is that medical  
 6 marijuana users in certain states may more easily evade the law by purchasing firearms without  
 7 notifying sellers that they use marijuana. This is not a proper equal protection claim, as the law  
 8 facially applies to every marijuana user, even if some people are able—through deceit or fraud—  
 9 to avoid prosecution or obtain a firearm. See United States v. Hendrickson, 664 F. Supp. 2d 793,  
 10 798 (E.D. Mich. 2009) (“There is no right under the Constitution to have the law go unenforced  
 11 against you, even if you are the first person against whom it is enforced . . . . The law does not  
 12 need to be enforced everywhere to be legitimately enforced somewhere.” (internal quotation  
 13 omitted)).

14 Furthermore, a marijuana registration card is only one of many pieces of evidence that an  
 15 FFL located in any state can consider in determining whether a particular buyer is an “unlawful  
 16 user of or addicted to a controlled substance.” As set forth in the Open Letter, it is incumbent  
 17 upon FFLs to consider “evidence of a recent use or possession of a controlled substance” during  
 18 a potential sale of a firearm. The Letter notes that § 922(d)(3) “makes it unlawful for any person  
 19 to sell or otherwise dispose of any firearm or ammunition to any persons knowing or **having**  
 20 **reasonable cause to believe** that such person is an unlawful user of or addicted to a controlled  
 21 substance.” See Compl., Ex. 2-B. (emphasis in original). Citing 27 C.F.R. § 478.11, the Letter  
 22 further states that “[a]n inference of current use may be drawn from evidence of a recent use or  
 23 possession of a controlled substance or a pattern of use or possession that reasonably covers the  
 24 present time.” Id. A marijuana registry card is simply an example of the evidence that the FFL  
 25 may consider, regardless of the state in which the sale takes place. Id.

**V. DEFENDANTS HAVE NOT VIOLATED PLAINTIFF'S RIGHT TO SUBSTANTIVE OR PROCEDURAL DUE PROCESS.**

Plaintiff argues in her opposition brief that Defendants have violated her right to procedural and substantive due process. Pl's Op. at 3-10. Neither of these claims was properly set forth in her Complaint. Though Plaintiff brings a claim under the Due Process Clause of the Fifth Amendment, this claim is unambiguously an equal protection claim, and not a claim based on procedural or substantive due process. See Compl. ¶¶ 52-57; Compl. Prayer for Relief, ¶ 2 (seeking a declaration that §§ 922(g)(3) and 922(d)(3) violate the Due Process Clause "by denying equal protection of the laws to law-abiding, qualified adults"). Accordingly, the Court should not address these "claims." See Broam, 320 F.3d at 1026 n.2; Ruiz, 2007 WL 1120350, at \*26.

**A. There is No Substantive Due Process Right to Use Marijuana for Medical Purposes.**

In the event that the Court addresses the substantive or due process claims raised for the first time in Plaintiff's opposition brief, these claims have no merit. Plaintiff posits that she has a "substantive right to treat her medical condition in the manner recommended by her physician and which she and her physician agree is the [best] course of treatment for her." Pl's Op. at 7. Plaintiff appears to aim her substantive due process challenge at the Controlled Substances Act and its classification of marijuana as a Schedule I drug.<sup>12</sup> 21 U.S.C. § 812(c), Schedule I(c)(10).

<sup>12</sup> To the extent that Plaintiff's substantive due process "claim" may be read to implicate her Second Amendment rights, such a claim should be rejected. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing' such a claim." Albright v. Oliver, 510 U.S. 266, 266 (1994) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)). Accordingly, "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." United States v. Lanier, 520 U.S. 259, 272, n.7 (1997); see also Richards v. County of Yolo, --- F.Supp.2d ---, No. 2:09-CV-01235, 2011 WL 1885641, at \*6 n.8 (E.D. Cal. May 16, 2011) ("Though the right to keep and bear arms for self-defense is a

(Footnote continued on following page.)

1 No matter how Plaintiff attempts to frame the right that she seeks to vindicate, the argument is  
 2 foreclosed by Raich v. Gonzales, 500 F.3d 850, 861-66 (9th Cir. 2007) (“Raich II”), in which the  
 3 Ninth Circuit rejected a nearly identical attempt to establish a fundamental right to use marijuana  
 4 for medical reasons.

5 Substantive due process protects asserted rights only if they are “‘deeply rooted in this  
 6 Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither  
 7 liberty nor justice would exist if they were sacrificed.’” Id. at 864 (quoting Washington v.  
 8 Glucksberg, 521 U.S. 702, 720-21 (1997)). Under Glucksberg, a court is obligated to “carefully  
 9 formulat[e]” a “narrow definition of the interest at stake,” instead of accepting a plaintiff’s broad  
 10 rhetorical flourishes, before deciding whether substantive due process protects that interest. Id.  
 11 at 863.

12 Here, though Plaintiff attempts to describe the substantial right at issue in terms of the  
 13 right to seek medical treatment, she omits the central component of the right she seeks to  
 14 vindicate: the use of marijuana in the course of her treatment. Plaintiff’s articulation of her right  
 15 is similar to the alleged right that the Raich II plaintiff sought to establish. Id. at 864 (noting that  
 16 plaintiff’s “carefully crafted interest” was “a fundamental right to ‘mak[e] life-shaping medical  
 17 decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain,  
 18 and preserve her life’”). The Ninth Circuit held that Raich’s framing of the fundamental right  
 19 was inaccurate because “[c]onspicuously missing from Raich’s asserted fundamental right is its  
 20 centerpiece: that she seeks the right to use marijuana to preserve her bodily integrity, avoid pain,  
 21 and preserve her life.” Id. (emphasis in original). As in Raich II, the right Plaintiff seeks to  
 22 vindicate in this case is the right to use marijuana as the course of medical treatment.

23 With this interest in mind, Plaintiff fails the second part of the Glucksberg test, as the  
 24 Ninth Circuit has rejected the existence of a fundamental right to use marijuana for medical  
 25 fundamental right, that right is more appropriately analyzed under the Second Amendment.”)  
 26 (citation and internal quotations omitted).

reasons. The right to use marijuana, even by persons who claim they need to use it to alleviate serious medical symptoms, does not meet the exacting standards required for the recognition of a new substantive due process right. The Raich II court, in analyzing whether the asserted right was “deeply rooted in this nation’s history and tradition” and “implicit in the concept of ordered liberty,” concluded that “federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering.” Id. at 866; see also Marin Alliance, 2011 WL 5914031, at \*11 (“Finally—and significantly—it is difficult to reconcile the purported existence of a fundamental right to use marijuana for medical reasons with Congress’ pronouncement that ‘for purposes of the [CSA], marijuana has no currently accepted medical use at all.’” (citing United States v. Oakland Cannabis, 532 U.S. at 491)). Accordingly, even had Plaintiff adequately raised a substantive due process claim, the claim must be dismissed.<sup>13</sup>

**B. Plaintiff’s Procedural Due Process “Claim” Must Fail, as She Has Not Been Deprived of a Constitutionally-Protected Liberty or Property Interest.**

Plaintiff further argues for the first time in her opposition brief that Defendants “deprived [her of her] fundamental rights in direct violation of the procedural requirements of the Due Process clause.” Pl’s Op. at 5. In the event the Court addresses this claim, Plaintiff fails to state a prima facie case to establish a procedural due process claim, which requires that Plaintiff allege facts showing: “(1) a deprivation of a constitutionally protected liberty or property interest, and

---

<sup>13</sup> Plaintiff cites a perceived “growing trend” in the number of states that have legalized the use of marijuana for medical purposes in an effort to show that “physicians believe cannabis has medicinal value and the public believes medical cannabis is a viable course of treatment.” Pl’s Op. at 7. Plaintiff’s characterization of what physicians or the public believe notwithstanding, under federal law, marijuana “has no currently accepted medical use in treatment in the United States.” 21 U.S.C. § 812(b)(1). More to the point, decriminalization measures in various states cannot retroactively create a “deeply rooted” history and tradition of a constitutional right to use marijuana, nor do those measures establish that a right to use marijuana is necessary to ensure that “liberty [and] justice would exist.” See Raich II, 500 F.3d at 864.



(2) a denial of adequate procedural protections.” Kildare v. Saenz, 325 F.3d 1078, 1085 (9th Cir. 2003). Plaintiff’s claim cannot survive the threshold inquiry, as she has not been deprived of a constitutionally-protected liberty or property interest. See Erickson v. United States, 67 F.3d 858, 861 (9th Cir. 1995) (finding that the guarantee of procedural due process applies only when a constitutionally protected liberty or property interest is at stake). As stated, users of marijuana for medical purposes, like all users of controlled substances in violation of federal law, fall outside of the scope of the Second Amendment. Plaintiff, therefore, has not shown that the government has deprived her of any constitutionally-protected liberty or property interest. See Clark K. v. Willden, 616 F. Supp. 2d 1038, 1041-42 (D. Nev. 2007) (dismissing procedural due process claims where plaintiffs failed to set forth a proper constitutionally-protected interest).

**VI. PLAINTIFF’S CONSPIRACY AND DAMAGES CLAIMS SHOULD BE DISMISSED.**

Defendants moved to dismiss Plaintiff’s conspiracy claim for lack of subject matter jurisdiction. Def. Mot. at 31-33. Plaintiff consents to the dismissal of this claim, Pl’s Op. at 25 (“Plaintiff does not object to the dismissal of her conspiracy claim.”), and it accordingly should be dismissed. In addition, to the extent that the Complaint could be construed otherwise, Plaintiff concedes that she may not pursue monetary damages against the United States. Def. Mot. at 30-31; Pl’s Op. at 25.

\* \* \*

**CONCLUSION**

For the reasons stated above and in Defendants' opening brief, the Court should grant Defendants' motion to dismiss (or in the alternative, enter summary judgment for Defendants), and deny Plaintiff's cross-motion for summary judgment.

Dated: March 30, 2012

Respectfully submitted,

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/s/ John K. Theis  
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America, ATF, U.S. Attorney General Eric Holder,  
Acting ATF Director B. Todd Jones, and  
Assistant ATF Director Arthur Herbert,  
in their official capacities (collectively, the United  
States)*

**PROOF OF SERVICE**

I, John K. Theis, Trial Attorney with the United States Department of Justice, certify that the following individual was served with **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT** on this date by the below identified method of service:

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DATED this 30th day of March 2012.

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7 *Attorneys for Plaintiff*

8  
9 UNITED STATES DISTRICT COURT  
10 DISTRICT OF NEVADA

11 S. ROWAN WILSON, an individual,  
12 Plaintiff,

13 v.

14 ERIC HOLDER, as Attorney General of  
15 the United States; THE U.S. BUREAU OF  
16 ALCOHOL, TOBACCO, FIREARMS  
17 AND EXPLOSIVES; B. TODD JONES, as  
18 Acting Director of the U.S. Bureau of  
19 Alcohol, Tobacco, Firearms and  
Explosives; ARTHUR HERBERT, as  
Assistant Director of the U.S. Bureau of  
Alcohol, Tobacco, Firearms and  
Explosives; and THE UNITED STATES  
OF AMERICA,

20 Defendants.  
21

Case No. 2:11-cv-1679

**FIRST AMENDED COMPLAINT**

22 COMES NOW Plaintiff S. ROWAN WILSON (the "Plaintiff" or "Ms. Wilson") by  
23 and through her counsel Charles C. Rainey and Jennifer J. Hurley of the THE LAW FIRM  
24 OF RAINEY DEVINE, and hereby submits her Complaint against the Defendants  
25 ATTORNEY GENERAL ERIC HOLDER, THE U.S. BUREAU OF ALCOHOL,  
26 TOBACCO, FIREARMS AND EXPLOSIVES, ACTING DIRECTOR B. TODD JONES,  
27 ASSISTANT DIRECTOR ARTHUR HERBERT, and THE UNITED STATES OF  
28 AMERICA (collectively, the "Defendants"), inclusive, alleging as follows:

**INTRODUCTION**

1  
2 1. This is an action to uphold the Constitutional right to keep and bear arms, which  
3 extends to all law-abiding adult citizens of the United States, and includes the right to  
4 acquire such arms.

5 2. The Second Amendment “guarantee[s] the individual right to possess and carry”  
6 firearms and “elevates above all other interests the right of law-abiding, responsible  
7 citizens to use arms in defense of hearth and home.” *District of Columbia v. Heller*, 554  
8 U.S. 570, 128 S. Ct. 2783, 2797, 2821 (2008).

9 3. However, in contravention of this fundamental constitutional right, the  
10 Defendants have prohibited a certain class of law-abiding, responsible citizens from  
11 exercising their right to keep and bear arms; the Defendants have enacted laws, policies,  
12 procedures and customs with the specific intent of denying the Second Amendment  
13 rights of persons who have registered to use medical marijuana pursuant to and in  
14 accordance with state law. The Defendants have deliberately banned such persons from  
15 purchasing handguns, or firearms of any kind, from federally licensed firearms dealers  
16 without providing any means of due process prior to depriving these persons of their  
17 rights.

18 4. Based on the Defendants’ interpretation of Section 922(g)(3) of the federal  
19 criminal code, the law prohibits law-abiding adults who have obtained medical  
20 marijuana cards pursuant to state law from lawfully purchasing what the Supreme  
21 Court has called “the quintessential self-defense weapon” and “the most popular  
22 weapon chosen by Americans for self-defense in the home.” *Heller*, 128 S.Ct. at 2818.

23 5. This blanket ban violates the constitutional rights of thousands of responsible,  
24 law-abiding American citizens and is thus invalid under the Second and Fifth  
25 Amendments.

**THE PARTIES**

26  
27 6. Plaintiff S. ROWAN WILSON is a natural person and a citizen of the United  
28 States and of the State of Nevada. Ms. Wilson presently intends to acquire a functional

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1 handgun for use within her home for self-defense but is prevented from doing so by  
2 Defendants' active enforcement of the unconstitutional policies complained of in this  
3 action. Ms. Wilson fears arrest, criminal prosecution, incarceration, and a fine if she  
4 were to acquire the aforementioned handgun. Indeed, Ms. Wilson has been unable to  
5 do so.

6 7. Defendant ATTORNEY GENERAL ERIC HOLDER heads the United States  
7 Department of Justice, which is the agency of the United States government responsible  
8 for enforcement of federal criminal laws. Defendant Holder, in his capacity as Attorney  
9 General, is responsible for executing and administering laws, customs, practices, and  
10 policies of the United States and is presently enforcing the laws, customs, practices and  
11 policies complained of in this action. Defendant Holder has ultimate authority for  
12 supervising all of the operations and functions of the Department of Justice.

13 8. Defendant U.S. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND  
14 EXPLOSIVES ("BATFE") is an arm of the Department of Justice responsible for the  
15 investigation and prevention of federal offenses involving the use, manufacture, and  
16 possession of firearms. The BATFE also regulates, via licensing, the sale, possession,  
17 and transportation of firearms and ammunition in interstate commerce. The BATFE is  
18 authorized to implement and enforce the federal law challenged in this case. BATFE is  
19 currently enforcing the laws, customs, practices and policies complained of in this  
20 action in Plaintiff's jurisdiction.

21 9. Defendant B. TODD JONES is the Acting Director of the BATFE and, in that  
22 capacity, is presently enforcing the laws, customs, practices and policies complained of  
23 in this action.

24 10. Defendant ARTHUR HERBERT is the Assistant Director of the BATFE and, in  
25 the capacity, is presently enforcing the laws, customs, practices and policies complained  
26 of in this action.

27 11. Defendant UNITED STATES OF AMERICA is a proper defendant in this action  
28 pursuant to 5 U.S.C. § 702.

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1 JURISDICTION AND VENUE

2 12. This case concerns certain subject matter under the original and exclusive  
3 jurisdiction of the federal courts of the United States of America.

4 13. This action seeks relief pursuant to 28 U.S.C. §§ 2201, 2202, and 2412. Therefore,  
5 jurisdiction is founded on 28 U.S.C. § 1331 in that this action arises under the  
6 Constitution and laws of the United States.

7 14. The Defendants, including the BATFE, are subject to suit for relief other than  
8 money damages pursuant to 5 U.S.C. § 702.

9 15. This Court has authority to award costs and attorneys fees pursuant to 28 U.S.C.  
10 § 2412.

11 16. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

12 COMMON ALLEGATIONS

13 17. On October 4, 2011, Plaintiff S. Rowan Wilson ("Ms. Wilson"), an adult-aged,  
14 law-abiding, responsible citizen, sought to purchase a handgun to use for self-defense  
15 in her home. See **DECLARATION OF S. ROWAN WILSON**, attached hereto as Exhibit  
16 "1" and incorporated herein by reference.

17 18. That day, Ms. Wilson visited Custom Firearms & Gunsmithing in Moundhouse,  
18 Nevada, hoping to purchase a Smith & Wesson model 686 chamber in 0.357" magnum  
19 (hereinafter referred to as the "Firearm"). *Id.* at 4:26.

20 19. However, when Ms. Wilson began to fill out her application paperwork for the  
21 purchase of a gun, the gun shop's proprietor, Frederick Hauser ("Mr. Hauseur"),  
22 stopped Ms. Wilson from completing question 11.e on the application.

23 20. Question 11.e asked whether the applicant was addicted to or an unlawful user  
24 of a controlled substance.

25 21. Ms. Wilson's natural inclination was to answer Question 11.e as "no."

26 22. However, Mr. Hauseur explained to Ms. Wilson that because Ms. Wilson was the  
27 holder of a state-issued medical marijuana registry card, Ms. Wilson was automatically  
28 deemed an unlawful user of a controlled substance and therefore not someone that he

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1 could sell a firearm to.

2 23. Mr. Hauseur further informed Ms. Wilson that he could not sell her a firearm  
3 without jeopardizing his federal firearms license. *Id.* at 5:32; *see* **DECLARATION OF**  
4 **FREDERICK JOHN HAUSEUR, IV**, attached hereto as Exhibit “2” and incorporated  
5 herein by reference.

6 24. Mr. Hauseur explained to Ms. Wilson that because of the mere fact that he was  
7 aware Ms. Wilson possessed a state-issued medical marijuana registry card he was  
8 prohibited from selling her the Firearm, any other firearm, or even any ammunition.  
9 Exhibit 1 at 5:32; Exhibit 2 at 3:12-14.

10 25. Roughly a week prior to Ms. Wilson’s visit to Custom Firearms & Gunsmithing,  
11 Mr. Hauseur received notice of a letter dispatched by the BATFE to all federal firearms  
12 licensees, in which the BATFE specifically forbade the sale of any firearms or  
13 ammunition to any person possessing a state-issued medical marijuana registry card.  
14 *See* Exhibit 2-B.

15 26. Mr. Hauseur’s refusal to sell Ms. Wilson the Firearm is the direct result of laws,  
16 policies, procedures and/or customs initiated and promulgated by the Defendants. *See*  
17 Exhibit 2 at 2:7-8; Exhibit 2-B; *see also* 18 USC 922(g)(3).

18 27. Ms. Wilson is a medical professional, who has, for some time, researched and  
19 studied the use of cannabis for medical purposes. *See* Exhibit 1 at 2-3.

20 28. Approximately three years ago, Ms. Wilson learned from a friend, who was  
21 suffering from severe endometriosis, that the use of cannabis can substantially mitigate,  
22 or even eliminate, the pain caused by persistent muscle spasms and other detrimental  
23 medical conditions. *Id.* at 2:14. Since that time, Ms. Wilson has extensively researched  
24 the efficacy of using cannabis as a medical treatment, including conducting interviews  
25 with a number of licensed physicians. *Id.* at 2:15. Most recently, Ms. Wilson met with  
26 Dr. Alan Shackelford, a practicing physician in Colorado and former fellow with the  
27 Harvard University School of Medicine, to discuss the use of cannabis as a medical  
28 treatment. *Id.* at 3:16-17.

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29. Ms. Wilson is currently a resident of Carson City, Nevada, and has resided in the State of Nevada since September 2006. Exhibit 1 at 2:4-5.

30. Ms. Wilson holds a bachelor's degree from the University of Texas, Austin, and a master's degree from Jones International University of Colorado. *Id.* at 2:6-8.

31. For the past year, Ms. Wilson has worked as a professional caregiver and medical technician, most recently accepting a position with Carson Valley Residential Care. *Id.* at 2:8.

32. For the past few months, Ms. Wilson has been actively researching medical schools and has met with and shadowed a series of doctors, as she plans to pursue a doctor of osteopathy. *Id.* at 2:9-12.

33. Ms. Wilson has additionally met with dozens of patients that have communicated to her their positive experiences with medical cannabis. *Id.* at 3:18.

34. Most of these individuals are elderly persons suffering from serious ailments, who find substantial relief and curative benefits from the use of cannabis. *Id.* Most of the individuals Ms. Wilson has encountered certainly do not fit the commonly portrayed, narrow-minded stereotype of a marijuana user. *Id.* at 3:19.

35. Ms. Wilson's interest in the medical efficacy of cannabis stems, in part, from her own struggles with severe dysmenorrhea (also referred to as severe menstrual uterine contractions), and the possible treatment options that cannabis offers. *Id.* at 3:20. Since the age of ten (10), Ms. Wilson has suffered from severe dysmenorrhea, which is often debilitating, even leading to further painful side effects, such as severe nausea and cachexia. *Id.*

36. In the fall of 2010, Ms. Wilson decided to apply for a Nevada medical marijuana registry card. *Id.* at 3:21.

37. The Nevada State Constitution states, in relevant part, at Article 4, Section 38:

"The legislature shall provide by law for: (a) The use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by seizure; multiple sclerosis

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and other disorders characterized by muscular spasticity; or other conditions approved pursuant to law for such treatment.”

38. Furthermore, Chapter 453A of the Nevada Revised Statutes provides a statutory framework specifically authorizing the issuance of medical marijuana registry cards to persons that have a doctor’s recommendation for the use of medical marijuana.

39. In October 2010, in full compliance with Nevada law, Ms. Wilson obtained and submitted an application for a Nevada State-issued medical marijuana registry card. Exhibit 1 at 3:21-24; *see also* Exhibit 1-B.

40. Ms. Wilson obtained a doctor’s recommendation for the use of medical marijuana, as required by Nevada law and submitted all of the appropriate paperwork to the State. *Id.* at 3:22.

41. On May 12, 2011, Ms. Wilson was issued a medical marijuana registry card from the State of Nevada. *Id.* at 3:24; *see also* Exhibit 1-B.

42. Approximately five months later, on October 4, 2011, when Ms. Wilson attempted to purchase the Firearm, the owner of the gun store, Fred Hauseur, denied Ms. Wilson’s right to purchase the Firearm based solely on the fact that she possessed a valid State of Nevada medical marijuana registry card. Exhibit 2 at 3:12-13.

43. In denying Ms. Wilson’s attempted purchase of the Firearm, Mr. Hauseur reasonably relied on the instructions directly provided by the BATFE. On or about September 21, 2011, the BATFE issued an open letter to all federal firearms licensees in which the BATFE specifically instructed firearms licensees to deny the sale of firearms or ammunition to any person whom the licensee is aware possesses a card authorizing such person to possess and use marijuana under state law. *Id.* at 2:7-8; *see also* Exhibit 2-B.

44. Mr. Hauseur received the BATFE open letter on or about October 1, 2011. *Id.* at 2:7. As a direct result of the open letter, Mr. Hauseur was compelled to deny Ms. Wilson’s attempt to purchase the Firearm. *Id.* At 2:12-14.

45. Furthermore, each purchase of a firearm requires that the purchaser complete Form 4473, as provided by the BATFE. Question 11(e) of Form 4473 asks, “Are you an

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1 unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic  
2 drug, or any other controlled substance?" Exhibit 1 at 4:29.

3 46. While Ms. Wilson's natural inclination would be to answer "No" to question  
4 11(e), Ms. Wilson was informed by Mr. Hauseur that the BATFE has promulgated a  
5 policy whereby any person holding a medical marijuana registry card is automatically  
6 considered an "unlawful user of, or addicted to marijuana." *Id.* at 4:30.

7 47. Because Ms. Wilson holds a valid medical marijuana registry card issued by the  
8 State of Nevada, but is clearly not an unlawful user of or addicted to marijuana, Ms.  
9 Wilson elected to leave question 11(e) on Form 4473 blank. *Id.* at 4:31.

10 48. Nevertheless, when Ms. Wilson provided Form 4473 to Mr. Hauseur, Mr. Hauser  
11 informed her that, even with Question 11(e) left blank, he could not sell her a firearm  
12 without jeopardizing his federal firearms license, since he had actual knowledge that  
13 Ms. Wilson possesses a state-issued medical marijuana registry card. *Id.* at 5:32; Exhibit  
14 2 at 3:12-14.

15 49. Ms. Wilson has never been charged with or convicted of any drug-related  
16 offense, or any criminal offense for that matter. Indeed, no evidence exists that Ms.  
17 Wilson has ever been an "an unlawful user of, or addicted to, marijuana, or any  
18 depressant, stimulant, or narcotic drug, or any other controlled substance." Ms. Wilson  
19 maintains that she is not an unlawful user of or addicted to marijuana or any other  
20 controlled substance. Nonetheless, Ms. Wilson was denied her Second Amendment  
21 right to keep and bear arms based solely on her possession of a valid State of Nevada  
22 medical marijuana registry card.

23 **I.**

24 **FIRST CAUSE OF ACTION**

25 **(VIOLATION OF 2<sup>nd</sup> AMENDMENT)**

26 50. Plaintiff hereby incorporates by reference paragraphs one (1) through forty-nine  
27 (49) as though fully set forth herein.

28 51. Title 18, Sections 922(g)(3) and 922(d)(3) and Title 27, Section 478.11 of the Code

1 of Federal Regulations ban federally licensed firearms dealers from selling firearms to  
2 any person “who is an unlawful user of or addicted to any controlled substance (as  
3 defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).”

4 52. The Defendants have implemented and are enforcing a policy whereby any  
5 person who possesses a medical marijuana card validly issued pursuant to State law or  
6 any person who a federally licensed firearms dealer “reasonably suspects” possesses a  
7 medical marijuana card validly issued pursuant to State law is summarily and  
8 conclusively deemed to be “an unlawful user of or addicted to any controlled substance  
9 as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).”

10 53. Thus, any person who possesses a medical marijuana card validly issued by  
11 pursuant to State law may not purchase a firearm from any federally licensed firearms  
12 dealer without committing a federal offense under Title 18, Section 922(g)(3) and Title  
13 27, Section 478.11, and a federally licensed firearms dealer may not sell a firearm to any  
14 person who he knows or “reasonably suspects” possesses a medical marijuana card  
15 validly issued pursuant to State law without committing a federal offense under Title  
16 18, Section 922(d)(3).

17 54. As a result of Title 18, Sections 922(g)(3) and 922(d)(3) and Title 27, Section 478.11  
18 of the Code of Federal Regulations and the Defendants’ ruling that any person who  
19 possesses a medical marijuana card validly issued pursuant to State law is conclusively  
20 deemed to be “an unlawful user of or addicted to any controlled substance as defined in  
21 section 102 of the Controlled Substances Act” the Plaintiff has been denied her Second  
22 Amendment right to obtain and possess a handgun.

23 55. These laws and policies infringe upon, and impose an impermissible burden  
24 upon, the Plaintiff’s right to keep and bear arms under the Second Amendment to the  
25 United States Constitution.

26 56. As a direct and proximate result of the foregoing law, policy, practice and/or  
27 procedure, as enacted and promulgated by the Defendants, the Plaintiff has suffered  
28 and continues to suffer damages.

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1 57. The Plaintiff has incurred attorney's fees and costs as a direct result of  
2 prosecuting the present court action.

3 **II.**

4 **SECOND CAUSE OF ACTION**

5 **(VIOLATION OF EQUAL PROTECTION CLAUSE OF THE 5<sup>th</sup> AMENDMENT)**

6 58. Plaintiff hereby incorporates by reference paragraphs one (1) through fifty-seven  
7 (57) as though fully set forth herein.

8 59. Title 18, Sections 922(g)(3) and 922(d)(3) and Title 27, Section 478.11 of the Code  
9 of Federal Regulations ban federally licensed firearms dealers from selling firearms to  
10 any person "who is an unlawful user of or addicted to any controlled substance (as  
11 defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

12 60. The Defendants have implemented and are enforcing a policy whereby any  
13 person who possesses a medical marijuana card validly issued pursuant to State law is  
14 automatically and conclusively deemed to be "an unlawful user of or addicted to any  
15 controlled substance as defined in section 102 of the Controlled Substances Act (21  
16 U.S.C. 802))."

17 61. As a result of Title 18, Sections 922(g)(3) and 922(d)(3) and Title 27, Section 478.11  
18 of the Code of Federal Regulations, and the Defendants' policy regarding persons who  
19 possesses a valid medical marijuana card issued pursuant to state law, the Plaintiff is  
20 being treated differently from similarly situated individuals.

21 62. Specifically, Plaintiff is being treated differently from persons who are prescribed  
22 medical marijuana in states where the obtainment of a state-issued medical marijuana  
23 registry card is not required. Because Plaintiff lives in a state where she is required to  
24 obtain a medical marijuana card prior to invoking any of the rights or benefits set forth  
25 in her state's statutes regarding medical marijuana and Plaintiff has followed such laws,  
26 she is automatically determined by Defendants to be an "unlawful user" of marijuana  
27 by Defendants regardless of whether or not she actually uses marijuana, and based on  
28 the Defendants' conclusory determination is denied her second amendment rights.

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1 Meanwhile, a person who lives in a state where a registration card is not required who  
2 is prescribed marijuana by his or her doctor is not automatically presumed to be an  
3 "unlawful user" of marijuana by the Defendants. Thus, Plaintiff is being treated  
4 differently from similarly situated persons.

5 63. Plaintiff is also being treated differently from similarly situated persons with  
6 similar medical conditions to those of the Plaintiff. The Plaintiff has been denied her  
7 right to purchase a handgun based on the Defendants' classification of Plaintiff as an  
8 "unlawful user" of marijuana simply because she has followed state laws for the  
9 obtainment of a method of treatment for her medical condition. Other similarly situated  
10 individuals who likewise pursue different methods of treatment for medical conditions  
11 have not been denied their ability to obtain handguns.

12 64. These laws and policies violate the Plaintiff's right to equal protection of the laws  
13 guaranteed under the Equal Protection Clause of the Fifth Amendment to the United  
14 States Constitution.

15 65. As a direct and proximate result of the foregoing law, policy, practice and/or  
16 procedure, as enacted and promulgated by the Defendants, the Plaintiff has suffered  
17 and continues to suffer damages.

18 66. The Plaintiff has incurred attorney's fees and costs as a direct result of  
19 prosecuting the present court action.

20 **III.**

21 **THIRD CAUSE OF ACTION**

22 **(VIOLATION OF PROCEDURAL DUE PROCESS CLAUSE OF 5<sup>th</sup> AMENDMENT)**

23 67. Plaintiff hereby incorporates by reference paragraphs one (1) through sixty-six  
24 (66) as though fully set forth herein.

25 68. Plaintiff possesses a protected liberty interest, namely, her right to possess a  
26 firearm under the Second Amendment.

27 69. The Defendants took legislative action by adopting a policy whereby any person  
28 who possesses a medical marijuana card validly issued pursuant to State law is

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1 automatically and conclusively deemed to be “an unlawful user of or addicted to any  
2 controlled substance as defined in section 102 of the Controlled Substances Act (21  
3 U.S.C. 802))” and therefore such a person cannot purchase a handgun from a federally  
4 licensed firearms dealer without committing a federal offence under Title 18, Sections  
5 922(g)(3) and Title 27, Section 478.11 of the Code of Federal Regulations. Such policy is  
6 not merely interpretive.

7 70. Defendants deprived the Plaintiff of her protected liberty interest through their  
8 promulgation of their policy whereby any person who possesses a medical marijuana  
9 card validly issued pursuant to State law is automatically and conclusively deemed to  
10 be “an unlawful user of or addicted to any controlled substance as defined in section  
11 102 of the Controlled Substances Act (21 U.S.C. 802))” and therefore such a person  
12 cannot purchase a handgun from a federally licensed firearms dealer without  
13 committing a federal offence under Title 18, Sections 922(g)(3) and Title 27, Section  
14 478.11 of the Code of Federal Regulations.

15 71. The Defendants have denied the Plaintiff adequate procedural protections before  
16 depriving her of her right to purchase and possess a firearm. Defendants did not issue  
17 any notice or hold any hearing prior to depriving the Plaintiff of her right. Defendants  
18 also have not offered any means for the Plaintiff to reclaim her right. In violation of the  
19 Plaintiff’s right to procedural due process, the Defendants have unilaterally and  
20 conclusively determined without any reason or supporting evidence that the Plaintiff is  
21 an “unlawful user” of marijuana simply because the State of Nevada has conferred on  
22 her the right to use medical marijuana.

23 72. As a direct and proximate result of the Defendants’ above-described actions, the  
24 Plaintiff has suffered and continues to suffer damages.

25 73. The Plaintiff has incurred attorney’s fees and costs as a direct result of  
26 prosecuting the present court action.

27 / / /

28 / / /

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IV.

**FOURTH CAUSE OF ACTION**

**(VIOLATION OF SUBSTANTIVE DUE PROCESS CLAUSE OF 5<sup>th</sup> AMENDMENT)**

74. Plaintiff hereby incorporates by reference paragraphs one (1) through seventy-three (73) as though fully set forth herein.

75. The Plaintiff's right to possess a handgun under the Second Amendment is objectively deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.

76. While it has been recognized that the Second Amendment is not unlimited and restrictions prohibiting felons from possessing firearms are valid, the Plaintiff's mere possession of a validly issued state medical marijuana card does not make her a felon nor does it mean that the Plaintiff has ever even used marijuana.

77. At the same time, Plaintiff possesses a fundamental right to free speech under the First Amendment which includes certain non-verbal speech which, in this case, is the possession of a medical marijuana registry card validly issued pursuant to state law.

78. Through Title 18, Sections 922(g)(3) and 922(d)(3) and Title 27, Section 478.11 of the Code of Federal Regulations, and their policy whereby any person who possesses a medical marijuana card validly issued pursuant to State law is automatically and conclusively deemed to be "an unlawful user of or addicted to any controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))" and thereby prohibited from purchasing a handgun from a federally licensed firearms dealer without committing a federal offence, Defendants have deprived Plaintiff of her substantive due process.

79. As a direct and proximate result of the Defendants' above-described actions, the Plaintiff has suffered and continues to suffer damages.

80. The Plaintiff has incurred attorney's fees and costs as a direct result of prosecuting the present court action.

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V.

**FIFTH CAUSE OF ACTION**

**(VIOLATION OF 1<sup>st</sup> AMENDMENT)**

81. Plaintiff hereby incorporates by reference paragraphs one (1) through eighty (80) as though fully set forth herein.

82. Under the First Amendment, Plaintiff possesses a fundamental right to free expression in the forms of freedom of association and free speech including certain non-verbal speech and communicative conduct, which, in this case, includes, without limitation, the acquisition, possession, and acknowledgment of possession of a medical marijuana registry card validly issued pursuant to state law.

83. The legalization of marijuana for medicinal purposes has been for years, and continues to be, a matter of political debate throughout the United States,

84. Largely as a result of voter initiatives, eighteen (18) states and the District of Columbia have legalized the use of marijuana for medical purposes.

85. By acquiring, possessing, and acknowledging possession of a medical marijuana registry card, Plaintiff is exercising her First Amendment right to free speech.

86. By acquiring, possessing, and acknowledging possession of a medical marijuana registry card, Plaintiff is expressing her support for and advocacy of legalization of medical marijuana.

87. Her medical marijuana registry card is a tangible symbol of her belief and opinion that marijuana should be legal for medical use, and a symbol of her belief and opinion that her fellow citizens of Nevada were correct to have forced changes to Nevada law legalizing marijuana for medical use.

88. Her political and personal opinions about medical marijuana are inherent in her discussions with others about the fact that she has a medical marijuana card.

89. By acquiring, possessing, and acknowledging possession of a medical marijuana registry card, Plaintiff was exercising her First Amendment right to freely associate with others who support and advocate the legalization of marijuana for medical use.

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1 90. The Plaintiff's medical marijuana registry card is a facial and express statement  
2 of her association with a group - medical marijuana cardholders - that embodies the  
3 belief and opinion that citizens in each state have a right to decide whether marijuana  
4 should be legal for medical purposes.

5 91. By acquiring, possessing, and acknowledging possession of a medical marijuana  
6 registry card, Plaintiff expresses her support for medical marijuana and her deeply held  
7 beliefs that marijuana should be legal for medical use.

8 92. The Plaintiff is, literally, a card-carrying advocate for medical marijuana, who is  
9 associated with a distinct group, identifiable by their inclusion in the medical marijuana  
10 registry.

11 93. Under the First Amendment, a citizen has the right to be free from governmental  
12 action taken to retaliate against the citizen's exercise of First Amendment rights and  
13 also has the right to be free from governmental action taken to deter the citizen from  
14 exercising those rights in the future.

15 94. By implementing and enforcing a policy that forbids a federally licensed firearms  
16 dealer from selling a firearm to any person who possesses a medical marijuana card or  
17 to any person who a federally licensed firearms dealer "reasonably suspects" possesses  
18 a medical marijuana card, Defendants are retaliating against Plaintiff's exercise of her  
19 First Amendment rights by denying her Second Amendment right.

20 95. Further, Defendants are also attempting to deter her from exercising her First  
21 Amendment rights in the future by requiring that she give up her First Amendment  
22 rights in exchange for her Second Amendment rights.

23 96. As a direct and proximate result of the Defendants' above-described actions, the  
24 Plaintiff has suffered and continues to suffer damages.

25 97. The Plaintiff has incurred attorney's fees and costs as a direct result of  
26 prosecuting the present court action.

27 / / /

28 / / /

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**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that the court enter judgment in her favor and against Defendants as follows:

1. Declare that 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and all derivative regulations, such as 27 C.F.R. § 478.11, and the policy set forth in the Defendants' open letter to federally licensed firearms dealers dated September 21, 2011, violate the right to keep and bear arms as secured by the Second Amendment to the United States Constitution.

2. Declare that 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and all derivative regulations, such as 27 C.F.R. § 478.11, and the policy set forth in the Defendants' open letter to federally licensed firearms dealers dated September 21, 2011, violate the Due Process Clause of the Fifth Amendment to the United States Constitution.

3. Declare that 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and all derivative regulations, such as 27 C.F.R. § 478.11, and the policy set forth in the Defendants' open letter to federally licensed firearms dealers dated September 21, 2011, violate the Equal Protection Clause of the Fifth Amendment to the United States Constitution.

4. Declare that 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and all derivative regulations, such as 27 C.F.R. § 478.11, and the policy set forth in the Defendants' open letter to federally licensed firearms dealers dated September 21, 2011, violate the right to free speech secured by the Second Amendment to the United States Constitution.

5. Permanently enjoin the Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them from enforcing 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and any and all derivative regulations, such as 27 C.F.R. § 478.11, and the policy set forth in the Defendants' open letter to federally licensed firearms dealers dated September 21, 2011, and provide such further declaratory relief as is consistent with the injunction.

6. Award the Plaintiff compensatory and punitive damages.

7. Award costs and attorneys fees and expenses to the extent permitted under 28 U.S.C. § 2412.

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1 8. Grant such other and further relief as the Court deems just and proper.

2 Dated this 17<sup>th</sup> day of December 2012.

3 Respectfully Submitted by:

4 RAINEY DEVINE, ATTORNEYS AT LAW

5 By: /s/ Chaz Rainey

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1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 THE HON. GLORIA M. NAVARRO, U.S. DISTRICT JUDGE, PRESIDING

4  
5 S. Rowan Wilson,

6 Plaintiff,

7 vs.

8 Eric H. Holder, Jr., et al.,

9 Defendants.

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Case No.  
2:11-cv-01679-GMN-PAL

Motion Hearing

CERTIFIED COPY

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15 TRANSCRIPTION OF PROCEEDINGS

16 Friday, November 2, 2012

17  
18  
19  
20 APPEARANCES:

See Next Page

21 DIGITALLY RECORDED:

9:13:52 a.m. to 10:43:20 a.m.

22 TRANSCRIBED BY:

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(702) 366-0635

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24  
25 Proceedings recorded by electronic sound recording, transcript  
produced by mechanical stenography and computer.

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10 For the Defendant:

11           **JOHN KENNETH THEIS, ESQ.**  
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1 **LAS VEGAS, NEVADA; Friday, November 2, 2012; 9:13:52 a.m.**

2 --o0o--

3 **P R O C E E D I N G S**

4 THE COURT: Thank you. You may be seated.

5 DEPUTY CLERK: Now calling the case of S. Rowan Wilson  
6 versus Eric Holder. Case number 2:11-cv-1679-GMN-PAL,  
7 regarding motion hearing.

8 Counsel, please note your appearances for the record.

9 MR. THEIS: Go ahead.

10 MR. RAINEY: Chaz Rainey here on behalf of the  
11 Plaintiff, S. Rowan Wilson.

12 THE COURT: And good morning, Mr. Rainey. And good  
13 morning, Miss Wilson.

14 MR. THEIS: John Theis on behalf of the Defendants.

15 THE COURT: And good morning, Mr. Theis. So it's  
16 Theis?

17 MR. THEIS: Theis.

18 THE COURT: Not T-h, not thise (phonetic). It's  
19 spelled T-h, but it's pronounced with a T.

20 MR. THEIS: That's correct.

21 THE COURT: All right. Thank you, Mr. Theis. Good  
22 morning. And did you come in from Washington, D.C.?

23 MR. THEIS: I did.

24 THE COURT: Okay. Well, we're glad we were able to  
25 have you here with us. We weren't sure there for a while with

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1 the hurricane if you were going to be able to be here. So I'm  
2 glad to see that you're safe and sound.

3 I appreciate that you all probably are prepared to  
4 present oral arguments to me. I'm hoping that it would be  
5 helpful to you for me to explain -- go ahead and be seated --  
6 my inclinations at this point.

7 I still have an open mind. I want to know whether you  
8 agree or disagree with my initial thoughts on the matter.  
9 There has been some changes in the law since you all finished  
10 the briefing, so that might be important for you to explain to  
11 me how you think that does or does not affect your position in  
12 this case.

13 So I'll just go over very briefly -- obviously, we're  
14 talking about the Federal Gun Control Act and two particular  
15 sections of Title 18 of the United States Code § 922(g)(3) and  
16 (d)(3).

17 As to the CFR, the Code of Federal Regulation, that's  
18 at issue at Title 27 § 478.11.

19 It's important to me to figure out which one of the  
20 two inferences of current use apply and, of course, the ATF  
21 Open Letter.

22 So first of all, looking at the Administrative  
23 Procedures Act at Title 5 of the United States Code § 553,  
24 which says, "Any proposed rule must undergo notice and comment  
25 unless the rule is interpretative."

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1 I want to know your thoughts and whether you think  
2 that the particular rule at issue is interpretative. And the  
3 one we're speaking of is at Federal code -- the Federal  
4 regulation that states that, "An inference of current use may  
5 be drawn from evidence of a recent use or possession of a  
6 controlled substance, or a pattern of use or possession that  
7 reasonably covers the present time." And so that is the  
8 definition of "unlawfully user" as used in the Federal Gun  
9 Control Act.

10 It appears that the question might turn on whether or  
11 not this rule issued by the ATF Letter and whether it's an  
12 interpretation. Is it an interpretative rule or is it a  
13 legislative rule? If it is a legislative rule, if it's  
14 something that Congress has delegated power to the Agency, and  
15 the Agency is intending to use that power to promulgate the  
16 rule at issue, then, obviously, it would be a legislative rule  
17 and then it would require comment and notice.

18 However, if, in fact, that rule is issued by the  
19 Agency just to advise the public of its own interpretation and  
20 construction of the statute which -- in regards to the rule  
21 which it administers, then it is an interpretative rule, and in  
22 that case would not be subject to notice and comment. It's  
23 just reflecting on the construction of the statute, and it's a  
24 statute which has been entrusted to the Agency to administer.

25 So looking at the Firearms Import/Export Roundtable

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1 Trade Group versus Jones case, which is the D.C. District Court  
2 case in 2012 recently, it -- they did determine that a  
3 different ATF Letter -- not this Open Letter but a different  
4 ATF Letter -- was interpretative and, thus, did not require  
5 comment and notice. So if you think that that case applies or  
6 doesn't apply here in some way, please let me know.

7 I would like for, if possible, for the Plaintiff to  
8 clarify whether or not she is challenging only the statute, the  
9 two subsections of the statute, or also the regulation itself.  
10 Is she seeking review of that ATF stated policy in the Open  
11 Letter only, or is she also challenging the statutes?

12 Because I'm not -- I'm not sure they're all the same  
13 thing. You know. They could be different things. You could  
14 say, well, the statute may be constitutional, but this  
15 interpretation doesn't apply. I don't want to put words in  
16 your mouth, but I want to make sure that I'm clear on what your  
17 position is.

18 If it's only the policy's affect on those two statutes  
19 in the regulation that keeps her from procuring the gun, then I  
20 want to know if that's -- if that's what your position is.

21 Also, if the ATF Open Letter requires notice and  
22 comment or not. Is it an interpretative rule or is it a  
23 legislative rule?

24 How much deference should the Court give to the ATF's  
25 interpretation? It's their interpretation. How binding is

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1 that? Does it have any precedential affect at all?

2 Do the answers to, you know, all of these questions  
3 that I'm kind of throwing at you for the first time -- and I  
4 appreciate if you can't answer them right now -- but how does  
5 that affect my determination of the merits of the action? And,  
6 of course, then there's the question of jurisdiction.

7 Looking more specifically at Section 922(g)(3) which  
8 is the portion of the Federal Gun Control Act that makes it  
9 unlawful for users of controlled substances to actually possess  
10 the guns, looking at that specifically, and the Dugan case,  
11 which is a Ninth Circuit case recently in 2011 that was decided  
12 after the Heller case, the Supreme Court Heller case. In Dugan  
13 they upheld Congress' ability to prohibit illegal drug users  
14 from possessing firearms.

15 So it appears to me that, regardless of the state law  
16 on the issue of medical marijuana, marijuana does still remain  
17 unlawful under the Federal law, so it seems like this claim  
18 would be barred by that Ninth Circuit precedent as issued by  
19 Dugan.

20 So tell me if you disagree or why that may not be --  
21 maybe that is not a complete -- doesn't completely prevent me  
22 from considering the issue if there's another way for me to  
23 look at it. But it does seem to me that that is a bar.

24 As to the 922(d)(3), which is the section that  
25 prohibits firearm sales to persons that the firearm seller

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1 knows or has reason to believe -- reasonable cause to believe  
2 is an unlawful user, that one is perhaps a little easier in a  
3 sense that under the Fourth Circuit's Chavin case --  
4 C-h-a-v-i-n -- the Court did know that, "The challenged law  
5 will only impose a burden on the conduct that is falling within  
6 the scope of the Second Amendments' guarantee if the conduct  
7 was understood to be within that scope at the initial time, at  
8 the original time of its ratification."

9           And so with that in mind, the Fourth Circuit  
10 determined -- they analyzed that at the time of the  
11 ratification of the Second Amendment, they weren't intending to  
12 protect an individual's right to sell firearms as opposed to  
13 possess firearms. And so it does appear that, because Congress  
14 can constitutionally preclude illegal drug users -- the key  
15 there being illegal -- drug users from possessing a firearm,  
16 Congress likewise could prevent sellers from selling a firearm.

17           So it looks to me -- I'm inclined to believe that the  
18 Second Amendment probably does not include a right to sell  
19 firearms and ammunition. So is that a complete bar or, again,  
20 is there another way of looking at it?

21           Also, I'm not sure as to that particular subsection  
22 whether there's a standing question there that needs to be  
23 addressed.

24           As to the constitutional analysis, obviously, we need  
25 to decide which one of the levels of scrutiny apply. Is it

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1 rational? Is it intermediate? Is it strict?

2 So the Government is arguing that it's the  
3 intermediate scrutiny, and the Plaintiff is arguing it's strict  
4 scrutiny.

5 The Government did rely on a series of cases,  
6 including the Nordyke case that was prior to the En Banc  
7 decision. So now we've had the En Banc decision at Nordyke, so  
8 I'd like you to explain to me how that does or doesn't change  
9 your position.

10 Let's see. I did look at U.S. v Carter, which is a  
11 Fourth Circuit's 2012 case finding that intermediate scrutiny,  
12 not strict scrutiny, applied.

13 I'm not sure that I'm persuaded that it's strict  
14 scrutiny. Most of the cases I believe do point towards  
15 intermediate scrutiny. Of course, there is that Nordyke case  
16 which found that it was actually a rational basis, but it was  
17 county -- that was the County Code violation for possessing the  
18 firearms or ammunition on County property. Not everywhere, but  
19 just on County property. So maybe that's the distinction. You  
20 can let me know what you think I should do or not do in regards  
21 to how Nordyke affects the issues here today.

22 Let's see. Substantive due process. The Fifth  
23 Amendment claims. There's the substantive due process or  
24 procedural due process and the equal protection as to the  
25 substantive due process.

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1 I think looking at the Raich -- and I'll spell that  
2 for the record, R-a-i-c-h -- v Gonzales case, which is the  
3 Ninth Circuit 2007 case, it does appear that the Ninth  
4 Circuit's already held that there's no constitutionally  
5 protected right to use marijuana for medical purposes.

6 I know there's the litany of right to abortion under  
7 the Planned Parenthood case, right to use contraceptives under  
8 the Eisenstadt case, right to refuse lifesaving hydration and  
9 nutrition under the Cruzan case. But the Raich case is a Ninth  
10 Circuit case, so it does have direct precedential value on  
11 my -- my court, you know, my jurisdiction. As opposed to if  
12 it's a different district, it's something I consider and give  
13 preferential treatment to but not necessarily directly  
14 controlling. But a Ninth Circuit case is directly controlling  
15 on this Court. So tell me why you think that can be  
16 distinguished, if you think it can.

17 Also, the questions regarding procedural due process  
18 and equal protection. I just think those are very weak. If  
19 you think that there's -- you know, I want you to use your time  
20 wisely. So if you think that you still want to convince me  
21 that those are issues that should -- that you can explain  
22 sufficiently to survive a Motion to Dismiss, go ahead and tell  
23 me. But if you don't want to spend too much time on those and  
24 just spend more time on the others that seem to be probably  
25 more viable at this point, that's up to you.

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1 The conspiracy claim also was dismissed already  
2 voluntarily by the Plaintiff so we don't need to go into that  
3 at all.

4 That's kind of my inclination and those are my  
5 questions. And since this is the Defendant's Motion to  
6 Dismiss, we'll go ahead and allow the defense to go ahead and  
7 speak first, and then we'll have a response from the Plaintiff,  
8 and then a reply from the Government, because it is your  
9 motion.

10 And then I most likely will not render a decision  
11 today. I think this is as much of a decision as you probably  
12 will get today as far as my -- what my inclinations are. I'll  
13 take it under submission at the end and issue a written ruling  
14 as soon as I can.

15 All right. So go ahead, Mr. Theis.

16 MR. THEIS: All right. Thank you, Your Honor.

17 At the outset, on your concerns about what I would  
18 call sort of the APA type concerns. Much of this issue is not  
19 fully presented in the -- in the Complaint or in the briefing  
20 that was submitted to the Court. So I will give sort of our  
21 initial impression to the questions that the Court's raised,  
22 but if possible, I'd like to reserve -- and if the Court would  
23 like this, we'd be happy to do this -- the opportunity to  
24 submit for the briefing on this particular question and answer  
25 the specific questions that the Court has on that issue.

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1           So if I can put that to the side for the moment and  
2 talk about the constitutional claims which are before the  
3 Court, if that -- if that works for Your Honor.

4           THE COURT: So which particular issue do you want to  
5 supplement?

6           MR. THEIS: What you first addressed. The question of  
7 whether or not this particular regulation and the Open Letter  
8 qualifies as an interpretative rule, what level of deference is  
9 required for this particular -- for the letter.

10           Those issues were -- the 7-0 -- though the APA was  
11 mentioned in the Complaint, it's only the waiver of sovereign  
12 immunity element of this, so there's no APA claim brought  
13 before the Court in this Complaint, so that's why this issue  
14 was not fully fleshed out.

15           And so that's why I'd like to hold on that particular  
16 question just for now. And in the course of this, if we get  
17 further answers on this, I'd be happy to give them.

18           THE COURT: All right. And there's a standing issue,  
19 as well.

20           MR. THEIS: That's correct.

21           THE COURT: Because she's not a seller, she's a  
22 buyer -- a potential buyer not a seller. So --

23           MR. THEIS: That's correct.

24           THE COURT: -- there's a standing question, too.

25           MR. THEIS: On that, Your Honor, I believe there's --

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1 we did not, you know, specifically raise that individual  
2 question. But yes, that is something that, obviously, the  
3 Court needs to look to its jurisdiction first, and if that's  
4 something that the Court can't find, that she is not -- doesn't  
5 have standing to raise this issue, then that's -- that's where  
6 we are.

7           To the constitutional issues. First, as -- as the  
8 Court correctly pointed out, the use of marijuana is prohibited  
9 under Federal law. Though certain states have -- such as  
10 Nevada issued past laws that suggest that the use may be used  
11 for medical purposes under state law, that is not recognized  
12 under Federal law.

13           So the individual registry card that she has here,  
14 which is the core of this case, does not prohibit her from  
15 any -- from -- that does not give her the right to use  
16 marijuana.

17           And that -- that concept sort of applies to several  
18 different issues in the claims that she's raised, and so we  
19 wanted to make that in the outset.

20           And as Your Honor points out, on 922(g)(3), the  
21 possession of -- of a controlled substance, we believe that is  
22 foreclosed by Dugan. There's no further need to engage in  
23 another constitutional analysis based on that. It's -- Dugan  
24 squarely held that Congress may prohibit the legal drug users  
25 from possessing firearms and that doesn't -- the Second

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1 Amendment does not change that analysis, and so that's where we  
2 are on that.

3           On the independent constitutional analysis that -- the  
4 Court does need to take that second step, we agree, as we  
5 pointed out in our briefs, that intermediate scrutiny is  
6 appropriate.

7           As to Nordyke, the original panel hearing was vacated  
8 by the En Banc decision. And so it's -- it's not exactly clear  
9 where the Ninth Circuit stands on this on the level of  
10 scrutiny, but I will say that every Court to address both the  
11 level of scrutiny required for 922(g) (3) and for every other  
12 section of 922(g) has held that intermediate scrutiny applies,  
13 and that's why we've argued in our brief that intermediate  
14 should apply.

15           And the reasons behind that are, one, that the level  
16 of burden that we're talking about here for 922(g) (3) is  
17 relatively low. An individual who is prohibited from  
18 purchasing a firearm by the -- it's a temporal scope to what is  
19 included in 922(g) (3). And so an individual can just stop  
20 using unlawful drugs and that would then allow them to -- to  
21 purchase a firearm.

22           Because of that temporal scope, because there's not as  
23 great a burden as there would be, some courts have said that  
24 that's a reason to use definitely less than strict scrutiny,  
25 but that intermediate scrutiny is appropriate.

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1           And then, two, the actual constitutional analysis  
2 itself, this statute has the compelling Government interest of  
3 protecting against public safety and preventing violent crime.  
4 And that's -- as we've demonstrated in our brief, there's  
5 reasonable fit between that compelling interest and the  
6 regulations that are at issue here.

7           We cite a wide variety of sources that demonstrate  
8 this -- that between those -- the interest and the regulation,  
9 including the legislative history, the fact that the majority  
10 of states have made the same determination, which the Yangtze  
11 Court in the Seventh Circuit found important for this question.  
12 And finally, the academic and empirical studies that we've  
13 cited that show this connection between crime and the use of  
14 marijuana.

15           So all of that in connection with the temporal scope  
16 point to -- this is the reason why all these courts have used  
17 intermediate scrutiny in the Court. If it does an independent  
18 constitutional analysis, it should use that, as well.

19           On (d)(3), we agree that Chavin forecloses this. This  
20 is -- no Court has recognized -- and it is clear from the  
21 nature of the right -- that the laws imposing conditions and  
22 qualifications on the commercial sale of arms, that there's --  
23 that there's no corresponding restriction for the sale of -- or  
24 I'm sorry -- protection for the sale of firearms.

25           Heller articulated the right as -- the core right as the

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1 right of law abiding, responsible citizens to use firearms in  
2 the hearth and home. There's no -- as Chavin pointed out,  
3 there's no corresponding right to sell firearms in that case.  
4 So we -- on the substantive issue, separate from the standing  
5 issue, that we agree with that -- or that's the position that  
6 the Court should take.

7 Your Honor asked about two other -- the Fifth Amendment  
8 claims. First on the -- it's our position the Complaint does  
9 not lay out a Fifth Amendment substantive or procedural due  
10 process claim, as we pointed out in our briefs. This was  
11 raised for the first time in the opposition to our Motion to  
12 Dismiss, and Plaintiff can't amend their Complaint to add these  
13 different claims.

14 But even if the Court were to address those claims, as the  
15 Court properly pointed out, Raich -- the Ninth Circuit opinion  
16 of Raich 2, has held that there is no substantive due process  
17 right to use marijuana, even if it's for medical purposes,  
18 under state law. And that -- and that squarely forecloses the  
19 substantive due process claim.

20 So those are the --

21 THE COURT: Can we go back to the 922(d)(3) claim,  
22 though? Because I'm not sure if you addressed whether or not  
23 you believe that the Plaintiff has standing to raise that  
24 claim.

25 MR. THEIS: If I could, Your Honor, I'd like to hold

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1 on answering that specific question. We didn't address that in  
2 our briefs because there are cases that have held that the  
3 denial of the right to possess -- or to use firearms and  
4 possess firearms, that that right alone gives you -- that that  
5 denial gives you standing, and I -- I'd like to confirm that  
6 that's been used in the same context of the 922(d)(3) for the  
7 sale. So that's why we didn't raise a specific standing  
8 argument in our briefs, and that's why we didn't put that as  
9 our first point that we would make in this case.

10 But -- but obviously, if Plaintiff is -- so I'd like  
11 to hold off and take a brief look at some notes that I have on  
12 that particular question because I want to give the Court the  
13 correct answer on the standing issue, essentially.

14 THE COURT: Why don't you take a look now, because  
15 that's important to me.

16 MR. THEIS: And other -- other than those particular  
17 issues, I believe I've addressed everything other than, again,  
18 that APA issue which we discussed at the outset.

19 THE COURT: Just a minute. I just want him to have a  
20 chance to look at --

21 MR. RAINEY: Oh, I'm sorry.

22 THE COURT: You weren't all -- were you completely  
23 done, Mr. Theis, or --

24 MR. THEIS: Other than the standing issue and the APA  
25 issue which we've -- I would like to do a bit more digging on

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1 that particular question. I think we're done with the rest of  
2 our argument, though.

3 THE COURT: Okay. Well, but before we go over to  
4 Plaintiff --

5 MR. THEIS: Okay.

6 THE COURT: -- please go ahead and take a look at your  
7 thoughts on standing.

8 (Pause in the proceedings.)

9 THE COURT: Mr. Theis, since you're going to be --  
10 I'll go ahead and grant your motion -- your oral motion to have  
11 supplemental pleadings on the Administrative Procedures Act  
12 issue. If -- if you're going to already be doing that anyhow,  
13 perhaps we'll -- I'll go ahead and allow more briefing on the  
14 standing issue and that will give Plaintiff an opportunity, as  
15 well, to be able to do a little research and guide the Court as  
16 to whether you think that, under the APA, you know, which  
17 states that if there's a rule that's proposed by an agency, if  
18 it's an interpretative rule -- and I'll spell that for the  
19 record again, i-n-t-e-r-p-r-e-t-a-t-i-v-e -- if it's an  
20 interpretative rule -- doesn't roll off the tongue very easily,  
21 does it? -- then there need not be any comment and notice. But  
22 if it is a legislative rule then there does need to be.

23 And so I think that's important to look at, and so  
24 I'll go ahead and allow both parties to provide further  
25 briefing on that issue, and on the issue of standing -- of the

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1 Plaintiff's standing.

2 And we'll set a briefing schedule after we're done  
3 here so that my -- my clerk can have a -- have some time to do  
4 that calculation.

5 So is there anything else, Mr. Theis, that you want to  
6 say? And I don't mean to rush you at all. In fact, I have the  
7 entire morning set aside for this. So I expected this would be  
8 more in-depth and would take longer. So feel free, if you have  
9 other things that you want to get into.

10 MR. THEIS: Nothing further, Your Honor, but I would  
11 like to reserve any time, obviously, to rebut any specific  
12 points that were made. But we've made the majority that we'd  
13 like for now, and we'll rest on our briefs on the rest.

14 THE COURT: All right. Thank you. All right.  
15 Mr. Rainey?

16 MR. RAINEY: One moment, Your Honor. Good morning,  
17 Your Honor.

18 THE COURT: Good morning. I was very intrigued by the  
19 issue.

20 MR. RAINEY: Yes, it's a fun one.

21 THE COURT: Yes, it is a fun one. And there isn't  
22 really anything directly on point in any other of the circuits.

23 MR. RAINEY: No.

24 THE COURT: So it is a very interesting one, and I  
25 think a very important question.

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1 MR. RAINEY: Mm-hmm.

2 THE COURT: So I am interested to hear what -- what  
3 else you have to add to this so far beyond what has already  
4 been provided in the briefings.

5 MR. RAINEY: Well, Your Honor, I want to begin by --  
6 by making it clear that we are challenging, not just the  
7 letter, and not just the regulation, but also the statute.

8 Now, we -- as we do that, we recognize that  
9 challenging the statute is a -- an uphill battle. It's a  
10 long-established -- sorry -- long-established statute. We're  
11 not -- we're not trying to deny that.

12 However, we have to begin from the fundamental  
13 preposition -- proposition that, under D.C. v Heller, the  
14 Second Amendment was interpreted as an individual fundamental  
15 right, and that was reiterated later by the U.S. Supreme Court.

16 And prior to that -- and I think we all can agree --  
17 that prior to that it was very much up in the air as to how the  
18 Supreme Court would interpret the Second Amendment. And so  
19 from there we have a very different proposition.

20 THE COURT: Well, the Court specifically held that the  
21 right was not unlimited.

22 MR. RAINEY: That's correct.

23 THE COURT: They did say that the Government can  
24 prohibit possession of weapons in some scenarios without  
25 running afoul of the Second Amendment.



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1 MR. RAINEY: Mm-hmm.

2 THE COURT: For example, prohibiting the possession of  
3 firearms by felons or mentally ill persons.

4 MR. RAINEY: Mm-hmm.

5 THE COURT: So it sounds like this is an as-applied  
6 constitutional challenge?

7 MR. RAINEY: Mm-hmm, yes. So the question here is, as  
8 applied in those two statutes, as applied in the corresponding  
9 regulations and, of course, as applied in that letter, the ATF  
10 Letter, was that a constitutional application a valid  
11 restriction on the right to own and purchase firearms?

12 I'd like to sort of take -- while I know that we are  
13 going to do a separate briefing on the standing issue, I want  
14 to point out, though -- the standing, it's not about the  
15 constitutional right to sell firearms. The problem is we're in  
16 a regulated profession where there's only one way to buy a  
17 firearm. If you want one, you have to go through a Federally  
18 licensed firearms -- Federally -- Federal firearms licensee.  
19 And if that's the only avenue, and then you're telling, through  
20 statute, that you're not allowed to sell any firearms to anyone  
21 who has this card, well, you have essentially a prior restraint  
22 issue where those people are now completely shut off from their  
23 Second Amendment right, even though they were kind of kept out  
24 of the equation all together.

25 The -- the most important thing that we have to focus

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1 on here is that we're not talking about someone who has been  
2 determined a user of medical marijuana, we're talking about  
3 somebody who has a card that, under state law, says they have a  
4 right to the use of the medical marijuana. And that's a huge  
5 distinction.

6           What the ATF is saying is that anyone who is a card  
7 carrying member of the medical marijuana party must  
8 automatically give up their Second Amendment rights. That  
9 they're not allowed to have a gun.

10           And as I say that, I realize, too, that there may be a  
11 real dire need to amend or maybe refile the case to include a  
12 First Amendment claim. Because really, that card is a form of  
13 political speech, and that's also reinforced by the cases that  
14 you have here in the State court determining that there's no  
15 real means of commercial access to medical marijuana, so it's  
16 very possible -- in fact, it's very likely -- that most people  
17 who have these cards aren't even users of medical marijuana  
18 because they have no means of accessing or of acquiring it.  
19 All the card says is that you have the right under state law to  
20 possess a certain amount and to grow the plant.

21           THE COURT: Okay. Well, if you are trying to add a  
22 First Amendment claim, that wouldn't be an issue on the Motion  
23 to Dismiss. The Motion to Dismiss essentially is looking at  
24 the face of the Complaint --

25           MR. RAINEY: Right.

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1 THE COURT: -- what has actually been pled -- not what  
2 maybe you would have wanted to plead or might want to plead  
3 later or add -- but what is actually pled and whether or not  
4 any of those --

5 MR. RAINEY: Mm-hmm.

6 THE COURT: -- claims should be allowed to proceed,  
7 whether or not they are valid or invalid.

8 MR. RAINEY: Right, your Honor. But actually, also  
9 in --

10 THE COURT: So I'd stick to those. Maybe you'll amend  
11 later, and maybe --

12 MR. RAINEY: Right.

13 THE COURT: -- it'll be dismissed and you'll want  
14 to --

15 MR. RAINEY: I understand it, but I think that also I  
16 want to point out that it's really that -- that that cause of  
17 action comes out of their defense. Because what they're saying  
18 is, look, it's not a big deal. If you just get rid of the  
19 card, we'll let you buy a gun again. It's sort of saying,  
20 look, you get to either have the card or you get to have the  
21 gun, you don't get to have both. You -- that's where --

22 Because there's no actual restraint on speech at this  
23 point, it's just saying, you know, everybody's allowed to get  
24 the card, but they're saying that once you get it, you're not  
25 allowed to have any of these rights.

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1 THE COURT: Okay. Well, this isn't what we're talking  
2 about the "they", "they", "they" without really being more  
3 specific. "They" is not Congress, this is not something that's  
4 been enacted by Congress --

5 MR. RAINEY: Right, by the ATF.

6 THE COURT: -- this is an ATF Open Letter.

7 MR. RAINEY: Mm-hmm.

8 THE COURT: So it either is a new rule that they are  
9 either enacting under the authority of Congress, in which case  
10 then you would, you know, consider it --

11 MR. RAINEY: Right.

12 THE COURT: -- just like a Congressional law, or is it  
13 just their interpretation of how they are going to be applying  
14 the law, in which case it is open to notice and comment and  
15 does have a different standard that's applied, it is a  
16 different kind of horse.

17 And so -- so I want to understand where it is that --  
18 what it is that the Plaintiff thinks about this distinction,  
19 that it's not directly from Congress --

20 MR. RAINEY: Right.

21 THE COURT: -- we didn't actually have a bill that was  
22 proposed and passed --

23 MR. RAINEY: Mm-hmm.

24 THE COURT: -- and signed by the President, this is --  
25 this is a rule.

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1 MR. RAINEY: Right. Examining the constitutionality of  
2 the -- the constitutionality of the ATF Letter. And if we look  
3 at that through the lens of legislative versus interpretative,  
4 the -- and again, I reserve the right to brief on this more  
5 later because it was not properly briefed in the underlying  
6 pleadings -- but the fact is that the letter makes it very  
7 clear, you're not to sell firearms to anyone who has this card.  
8 Don't do it.

9 And if you're saying that, the ATF is essentially  
10 foreclosing any further notice or hearing as to whether or not  
11 these individuals are, in fact, illegal drug users. They're  
12 just saying we've made the decision, if you have the card,  
13 you're automatically deemed an illegal drug user. And as an  
14 automatically deemed illegal drug user, you're not entitled to  
15 a firearm and you can't sell that firearm to that person. And  
16 by making that --

17 THE COURT: But that wasn't necessarily the rule  
18 before the Open Letter was issued.

19 MR. RAINEY: No.

20 THE COURT: This is an interpretation analysis by an  
21 administrative agency of how it is going to react to the  
22 situation that it's faced with with what do we do about this  
23 scenario in these particular states where medical marijuana is  
24 allowed --

25 MR. RAINEY: Mm-hmm.

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1 THE COURT: -- what do we want to do about it?

2 MR. RAINEY: Mm-hmm.

3 THE COURT: And they decide what they're going to do  
4 about it, how they interpret the law, and how it should apply.

5 MR. RAINEY: Sure. But it forecloses any further  
6 opportunity for these people to acquire a firearm.

7 And if you're a Federal firearms licensee and you read  
8 that letter, you know for a fact, I am now prohibited from  
9 making any further sales to these individuals. At that point  
10 you've cut off the Second Amendment rights of an entire class  
11 of individuals.

12 And you've said that this fundamental individual  
13 Second Amendment right is not -- is no longer offered to these  
14 people simply because they went and got a card.

15 Again, if you look at the other cases in which this  
16 law has been applied, and you look at those other cases, those  
17 are cases where people were convicted of criminal acts, cases  
18 where people were indicted for --

19 I mean, the Dugan case is a great example. The Dugan  
20 case, which by the way is only, what, two pages long and  
21 doesn't really give much analysis at all -- the Dugan case is  
22 about somebody who was running, essentially, a drug ring out of  
23 their apartment and an illegal firearms business.

24 Where here, we're talking about a woman who went to  
25 her physician, got a med -- got a prescription, essentially,

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1 for medical marijuana, went to the Government and got a  
2 State-issued card, and now says, just because you got that  
3 card, you can't own a gun.

4 That's -- it's a completely night and day example.  
5 And it also underscores the fact that we also believe that this  
6 Court does have the --

7 THE COURT: Well, and I do empathize with the  
8 situation that she finds herself in. There are plenty of  
9 legal, prescribed medications that may or may not be much more  
10 dangerous --

11 MR. RAINEY: Mm-hmm.

12 THE COURT: -- than marijuana as far as the scientific  
13 world has told us, and what they know about drugs and drug uses  
14 and the effects. You know, morphine comes to mind. That's  
15 something that's prescribed for pain, and I'm told will  
16 essentially kill you if you take it for too long, right?

17 But, you know, that's -- that doesn't necessarily  
18 negate someone's possession of a gun so long as there's no  
19 other -- you know, if they're taking it, obviously, for a  
20 mental illness, or if they're a felon, or so forth, then there  
21 could be other problems.

22 So I completely sympathize with the situation, and so  
23 don't want that to be lost on Miss Wilson, but this is a matter  
24 of -- of, not facts, but rather a matter of law, and so we do  
25 need to have -- keep that in mind that we look through the --

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1 the recent law and any of the precedent that we have for  
2 guidance --

3 MR. RAINEY: Mm-hmm.

4 THE COURT: -- and not just act out of sympathy --

5 MR. RAINEY: No.

6 THE COURT: -- but rather try to be logical about  
7 this. So I think that your stronger argument is probably as to  
8 this ATF Open Letter.

9 MR. RAINEY: Oh, and I agree with that, Your Honor,  
10 and we don't question that. We think that the ATF Letter --  
11 that we have a much stronger argument there, and it's a very  
12 uphill battle to argue the unconstitutionality of the statute.

13 But I also think that Dugan doesn't really deal with  
14 this situation and it's not really on point. It definitely  
15 discusses the statute as applied in that context, but I just  
16 don't think that -- and while it does say that the Government  
17 has a right -- sort of omnibus right to restrict Second  
18 Amendment rights to dangerous people, it doesn't deal with this  
19 situation, and it's not directly on point here.

20 And when you start taking the, sort of, broad  
21 interpretation that the ATF has taken of the statute, and you  
22 start seeing how it kind of gets wider and wider as you go from  
23 the -- the regulations -- when you go from the statute to the  
24 regulations to the letter, it sort of becomes this -- this  
25 giant Pacman that envelopes all of us, where we're suddenly --

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1 the Second Amendment rights are deprived from just an enormous  
2 cross-section of people.

3 And I -- I think that's something that has to be  
4 entertained by the courts and dealt with.

5 And when you look at all of these cases that are  
6 cited -- and I could read them off here -- I mean, you go  
7 through, you know, United States versus Marzzarella in the  
8 Third Circuit. Again, indicted for possession of firearm with  
9 an obliterated serial number in violation of 922(k).

10 You have Huddleston v United States which is a  
11 previously convicted felon. You have U.S. v Reese in the 10th  
12 Circuit, criminally charged with possessing firearms while  
13 subject to Domestic Protection Order. They're just -- they're  
14 all way outside the scope of this.

15 Here we're saying it's a prior restraint before  
16 there's been any notice, any hearing onto whether that  
17 individual has been an illegal user.

18 And that's where our procedural due process claim  
19 comes in, too, is that you're saying, if you're going to deny  
20 them the right, you have to have some sort of notice and  
21 hearing to say you are deemed an illegal user. You can't just  
22 say we think you're an illegal user. And as -- because we  
23 think that, we're now going to deprive you -- before any sort  
24 of hearing or anything -- we're going to deprive you of that  
25 right.

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1 Now, I know the day sort of --

2 THE COURT: Well, what the letter specifically says is  
3 that if a seller believes, you know, knows, or has reasonable  
4 to believe --

5 MR. RAINEY: Right.

6 THE COURT: -- that she's a cardholder -- and this was  
7 kind of a unique situation where the seller wasn't someone who  
8 was unknown to Miss Wilson, they actually knew each other, and  
9 so he was aware that she was -- that she did have a card for  
10 medical marijuana -- I don't think there's a question as to  
11 whether or not she actually possesses marijuana, it's just the  
12 possession of the card --

13 MR. RAINEY: Right.

14 THE COURT: -- at this point --

15 MR. RAINEY: Right.

16 THE COURT: -- and maybe that's an issue that's --

17 MR. RAINEY: Mm-hmm.

18 THE COURT: -- more important and shouldn't be  
19 overlooked than the fact of, you know, whether or not she  
20 actually possesses marijuana, she only possesses the card at  
21 this point.

22 MR. RAINEY: And I don't think this is a unique  
23 situation. I mean, Miss -- Miss Wilson is, in fact, I mean, a  
24 medical marijuana advocate. I mean, she's someone who's been  
25 politically active in the movement to get more broad medical

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1 access for patients, she works -- she's worked in the medical  
2 profession, she believes that the treatment is helpful to  
3 people with various ailments from cancer, to HIV, and other  
4 conditions.

5           But she -- and so her presence within the community,  
6 just like anybody else who happens to be a medical marijuana  
7 activist who is carrying these cards, those people would be  
8 known if they went to buy a firearm probably within their  
9 community in the same context. I mean, we're talking about a  
10 small community in rural Nevada where everybody knows  
11 everybody. And so I don't think it's that unique a situation.

12           Moreover, I think where this issue came to light  
13 through the ATF, and why the ATF felt -- I guess, the reason  
14 they wanted to pass this rule was because people were using --  
15 because when you see the state-issued cards, they look just  
16 like driver's licenses. I mean, they're state-issued. And so  
17 people would pull them out and use them as identification.

18           THE COURT: So it sounds like you're going beyond the  
19 rule here that is the inference. I took it to mean that the  
20 real concern here was not necessarily whether or not she  
21 possesses marijuana or whether she intends to possess marijuana  
22 and a gun both together at the same time, but the fact that  
23 there's an inference being made by the ATF Letter that, just  
24 because she is a card carrying member or has a card -- I guess  
25 not a membership -- but carries a card, that that alone allows

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1 an inference that she, in fact, is going to possess marijuana,  
2 much like someone who might be an advocate for Pro Life --

3 MR. RAINEY: Mm-hmm.

4 THE COURT: -- and, you know, doesn't think that  
5 abortions should be illegal. Because, I mean, that person has  
6 to be getting an abortion, or has got an abortion, or ever is  
7 going to -- it could be a man. You know? It could be  
8 anybody --

9 MR. RAINEY: Absolutely.

10 THE COURT: -- that's -- that's -- so the fact that  
11 she has a medical marijuana card, I don't know whether that's  
12 maybe the stronger argument here is that it's the  
13 interpretation that's being given by the ATF Letter that -- the  
14 authority to the seller to make an inference --

15 MR. RAINEY: Mm-hmm.

16 THE COURT: -- that she possesses marijuana. And even  
17 if you were to admit that, were she actually to possess  
18 marijuana and a gun, that perhaps that would be a different  
19 situation, a different argument for another day. But today's  
20 argument --

21 MR. RAINEY: Mm-hmm.

22 THE COURT: -- is that the inference itself, that just  
23 because she has the card necessarily is, you know, proof  
24 positive sufficient for a seller to determine that they are not  
25 allowed to legally sell a gun to her.

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1 MR. RAINEY: Right. And, Your Honor, I think that  
2 goes back to, if you look at the typical application of these  
3 922 statutes, it's usually in the context of a criminal case  
4 where someone's already been found guilty or is being  
5 prosecuted for, you know, possession of illegal drugs, you  
6 know, we found in his car a kilo of cocaine under the  
7 passenger's seat and the gun in the glove box, and they're  
8 saying, ah-ha, now I've got an extra charge to throw at him  
9 because he's not allowed to have that gun if he's got the  
10 cocaine. And so that's usually the context in which we see  
11 these cases.

12 What I think has happened here, and what our argument,  
13 is that the ATF has made a politically motivated statement  
14 against an entire political movement, and has basically tried  
15 deliberately to tweak the law to target this group and start  
16 depriving rights.

17 And, of course, outside the scope of this case, there  
18 are other issues where they've done similar -- similar acts,  
19 but we're focused here just on the Second Amendment violation.

20 And what's happened is they're saying -- they're using  
21 922 for the purpose of targeting the medical marijuana law --

22 THE COURT: I'm not inclined to find that because  
23 someone is a marijuana user, regardless whether they have a  
24 card or not, that they are allowed to have a gun, when under  
25 Federal law marijuana is still illegal.

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1 MR. RAINEY: That's -- and that's not the --

2 THE COURT: So I'm just probably not going to go  
3 there --

4 MR. RAINEY: Right. And that's --

5 THE COURT: -- is what I'm telling you as far as  
6 wisely using your time.

7 However, the fact that she has -- there's no proof to  
8 the seller that she actually possesses marijuana other than  
9 that she has the medical marijuana card. But the ATF is  
10 telling the seller that's enough.

11 MR. RAINEY: That's right.

12 THE COURT: So I think that maybe is more of a concern  
13 to the community as far as whether this is overreaching and  
14 being applied incorrectly or improperly as opposed to if the  
15 seller was to walk -- you know, if she was to walk in to buy a  
16 firearm, and she had, you know, a bag of marijuana in one  
17 hand --

18 MR. RAINEY: Right.

19 THE COURT: -- and the money to pay for the firearm in  
20 the other, that would be different, and I think that's  
21 something that probably you don't want to argue today --

22 MR. RAINEY: No, that's not something I want to argue  
23 today.

24 THE COURT: -- because I don't think you're going to  
25 win on that argument. Here we don't know for a fact that she

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1 has --

2 MR. RAINEY: Mm-hmm.

3 THE COURT: -- any marijuana or -- and I think that's  
4 probably your better argument.

5 MR. RAINEY: Right. And then when we get to the equal  
6 protection argument, the argument there also deals with the  
7 card saying that, like, well, in states where they don't  
8 require a registry card, those people can just walk in and buy  
9 a gun even if they are smoking weed, if they are chronic,  
10 addicted users, if it is -- you know, there's medical opinion  
11 that says you can't be addicted -- but that aside, even if you  
12 had someone who was regularly smoking marijuana and is openly  
13 smoking marijuana in that state, they could just walk in and  
14 they don't even have the card. And so the Federal firearms  
15 licensee doesn't even have to take that into consideration.

16 Whereas, a similarly-situated person in the State of  
17 Nevada, where you have a state-issued driver's license looking  
18 card, that person is denied a Federal firearms licensee --  
19 Federal firearms purchase if they -- just because of the fact  
20 that they have the card.

21 THE COURT: Okay. So you were advocating the standard  
22 of strict scrutiny.

23 MR. RAINEY: Yes.

24 THE COURT: So let's assume for a moment that the  
25 Government is correct --

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1 MR. RAINEY: Mm-hmm.

2 THE COURT: -- when they argue that intermediate  
3 scrutiny should actually apply.

4 MR. RAINEY: Mm-hmm.

5 THE COURT: How -- and so they must show that the  
6 regulation is substantially related to an important  
7 Governmental objective.

8 MR. RAINEY: Right.

9 THE COURT: So how does this regulation not pass  
10 muster?

11 MR. RAINEY: Well, first of all, I wanted to point out  
12 that the -- what the -- what the Circuit Court -- just as a  
13 preliminary -- what the Circuit Courts have been saying,  
14 really, is -- at least in that Seventh Court -- I think it's  
15 the Seventh Circuit is the first, I think, to deal with this, I  
16 could be wrong -- but what they are saying, sort of, is there's  
17 this two-prong test, right? One is, is there a  
18 constitutional -- is there a Second Amendment right being  
19 deprived -- which I think in this case is pretty  
20 straightforward, it's a gun, you're not allowed to have it --  
21 but the second prong is, depending upon the level of the  
22 deprivation, what level of scrutiny we apply and the extent to  
23 which -- it was sort of this weird sliding scale that I believe  
24 was presented in *Ezell v City of Chicago*? Is that correct? I  
25 apologize if I'm mispronouncing that.

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1 But it -- but the -- if we were to apply intermediate  
2 scrutiny -- because I recognize that, even though the Ninth  
3 Circuit has this, sort of, strange opinion on En Banc, that  
4 most of the courts have adopted an intermediate scrutiny  
5 standard -- if we're applying that, again, it goes back to the  
6 card versus the usage.

7 They're saying, if you have a card, you're  
8 automatically a user. There's no -- it's not substantially  
9 related to any Government purpose at that point. We're just  
10 saying anybody who happens to have a medical condition where  
11 their doctor has advised them to do this must be denied a gun.

12 And -- and, I mean, at that point, too, I mean, you've  
13 probably got people within this context who just go out, see  
14 their doctor, and have no inclination towards smoking marijuana  
15 or breaking the law. And the doctor says, you know what? I  
16 recommended this treatment for you. And they go and go through  
17 the process of getting the card, and we're now going to say,  
18 well, you don't get a gun because your doctor made that  
19 recommendation. There's no -- there's not even a rational  
20 basis connection there. It's just sort of saying this is --  
21 it's comparing apples and bullets. It just doesn't make any  
22 sense.

23 THE COURT: So is having a medical marijuana card  
24 substantially related -- well, I guess the question is -- is  
25 having a medical marijuana card -- and -- is having a medical

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1 marijuana card essentially the same as being an unlawful user?

2           Is having a medical marijuana card substantially  
3 related to the Governmental objective, the very important  
4 Governmental objective, of prohibiting weapons from individuals  
5 who may not be of the best judgment in order to exercise  
6 control of such a dangerous weapon --

7           MR. RAINEY: Right.

8           THE COURT: -- or is it to attenuate it? Is having  
9 the card alone to attenuate it and not the same as possessing  
10 the actual marijuana?

11           MR. RAINEY: Right. And I think there we have to look  
12 at the policy purpose that is adherent to -- I'm sorry --  
13 inherent to the 922 statutes. And the idea there is being like  
14 someone who is addicted to a controlled substance has --  
15 doesn't have the ability to judge right from wrong, I guess,  
16 because they're under the throws of the substance, and then  
17 those who are illegal users of a substance, I think the  
18 argument there --

19           THE COURT: Well, there's public safety --

20           MR. RAINEY: Right.

21           THE COURT: -- and you want to prohibit crime --

22           MR. RAINEY: Right.

23           THE COURT: -- that's violent from -- from --

24           MR. RAINEY: Right. But to get there you have to make  
25 a connection between unlawful use and violent crime and all of

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1 these other ills that could be inflicted on society. And I  
2 think in order to get there you say, well, this person's  
3 already breaking the law so they're gonna -- they're liable to  
4 break the law in other ways.

5           You say that this person is under the influence of the  
6 substance, so they're liable to break the law because of the  
7 substance.

8           And so I think in this context you have to look at it  
9 and say, well, but if we're talking about patients who have  
10 been advised by their physicians to do it -- this specific  
11 course of treatment -- those aren't -- those aren't law  
12 breakers, these are people that are doing what their physician  
13 tells them to do. These are people that are even going the  
14 extra step and following the State-implemented Government  
15 system to get the appropriate card to follow that treatment.

16           Now, if they -- if they don't follow the treatment  
17 afterwards, if they ultimately decide, you know what, I just  
18 don't want to do that, I don't want to break the law at that  
19 point -- but they haven't broken the law in any way up to the  
20 point of application for the card.

21           THE COURT: But they haven't broken State law, but  
22 they have violated Federal law. That's the issue here is that  
23 Heller is saying that there are limitations and --

24           MR. RAINEY: Right.

25           THE COURT: -- when someone is breaking the law, then

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1 they're an unlawful user as opposed to a lawful user. So I  
2 realize --

3 MR. RAINEY: Right, but there is --

4 THE COURT: -- the State law hasn't been broken, but  
5 the Federal law, you have to admit, has been broken.

6 MR. RAINEY: No. There's no Federal law that says you  
7 can't get the card. The Federal law doesn't say that. The  
8 Federal law says you can't use marijuana, you can't possess  
9 marijuana, and it doesn't say you can't get the card.

10 So if we have, an example, a cancer patient who's told  
11 by their physician --

12 THE COURT: So again, the issue here really is the  
13 ATF's interpretation of -- and let me go back and read the --  
14 the actual language of the statute here in issue.

15 It starts off essentially with the 922(g)(3) portion  
16 which is, "It's unlawful for a user of controlled substances to  
17 possess firearms." So it's an unlawful user of controlled  
18 substance.

19 MR. RAINEY: Yes.

20 THE COURT: And then the 922(d)(3) is where it  
21 "prohibits the firearm seller who knows or has reason to  
22 believe that the person is an unlawful user".

23 So where the ATF Letter says that, "evidence of a  
24 recent use or possession of a controlled substance or  
25 pattern" -- I'm sorry -- going back to the definition of

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1 unlawful use is one -- "An inference can occur and can be drawn  
2 from evidence of a recent use or possession of a controlled  
3 substance, or a pattern of using or possessing that reasonably  
4 covers..."

5           So it's actually an inference within an inference at  
6 this point --

7           MR. RAINEY: Mm-hmm, yes.

8           THE COURT: -- so it's actually a double inference.  
9 So the inferences that if there is a pattern of use or  
10 possession, that that could constitute unlawful use, and then  
11 the inference as to whether that applies is the Open Letter  
12 from the ATF that, "possession of the marijuana card  
13 constitutes reasonable cause to believe that the buyer is an  
14 unlawful user."

15           MR. RAINEY: Mm-hmm. It's really, Your Honor, in that  
16 one sentence on the letter, if you read it, it says, "Further,  
17 if you are aware that the potential transferee is in possession  
18 of a card authorizing the possession and use of marijuana under  
19 State law, then you have reasonable cause to believe that the  
20 person is an unlawful user of a controlled substance."

21           And it says prior to that that if you have that reason  
22 to believe, you are not to sell them a gun.

23           THE COURT: Okay. So under intermediate scrutiny, I  
24 think we agree that there is an important Governmental  
25 objective. The question is whether or not, when this

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1 particular new rule that's issued under the letter is  
2 substantially related to that important objective, or is it to  
3 attenuate it?

4 MR. RAINEY: Hmm.

5 THE COURT: Would you --

6 MR. RAINEY: That's exact --

7 THE COURT: -- agree with that --

8 MR. RAINEY: Yeah.

9 THE COURT: -- being your position?

10 MR. RAINEY: That is correct, Your Honor. Now, as I  
11 say that, I don't waive the arguments that if she's --

12 THE COURT: I know you want me to reach further, but I  
13 don't think it's gonna happen.

14 MR. RAINEY: Right. But I also say that that is  
15 our -- that is our initial proposition is that you can't just  
16 say that this card is -- is -- you know, is itself  
17 justification.

18 And I think that that concludes our argument here. If  
19 you have any further questions --

20 THE COURT: And you want to reserve the right to argue  
21 standing as well; is that right?

22 MR. RAINEY: Yes, yes, I do want to -- right.

23 THE COURT: Let's see what else I have here. All  
24 right. So we'll allow the parties both to brief the effects of  
25 the Nordyke En Banc decision as well as the standing issue.

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1           Let's see if there was something else. I have  
2 somewhat of a question about the Court's jurisdiction. I'm not  
3 sure that I've worked myself through it yet --

4           MR. RAINEY: Mm-hmm.

5           THE COURT: -- in regards to the fact that she hasn't  
6 actually been charged under this statute criminally.

7           MR. RAINEY: Mm-hmm.

8           THE COURT: It is more of an issue of her being  
9 prevented from obtaining the firearm.

10           But with the understanding that if she were to obtain  
11 the firearm --

12           MR. RAINEY: Mm-hmm.

13           THE COURT: -- then the Government's position very  
14 clearly in regards to the Open Letter is that she would be  
15 charged -- or, of course, they have discretion -- prosecutorial  
16 discretion -- to decide whether or not to use their funding and  
17 their resources and things on --

18           MR. RAINEY: Right.

19           THE COURT: -- an individual such as Miss Wilson, or  
20 whether they would prefer to use it --

21           MR. RAINEY: Yeah. And, Your Honor --

22           THE COURT: -- on other individuals. So I'm not sure  
23 whether that jurisdictional question is one that is  
24 controlling. But even if you all don't bring it up, that's the  
25 Court's duty is to look at jurisdiction. I'm reminded of the

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1 case that went all the way up to the Supreme Court --

2 MR. RAINEY: Right.

3 THE COURT: -- many years after the case had been  
4 filed, and when it got there, one of the first things the  
5 Supreme Court said is this was never a Federal question.  
6 There's no jurisdiction here.

7 So I definitely don't want to waste your time, if  
8 that's the case, if I don't even have jurisdiction. But, like  
9 I said, I'm not sure that I've worked myself through that yet.

10 MR. RAINEY: Right.

11 THE COURT: Is there anything else that you want to  
12 add?

13 MR. RAINEY: You know, and Your Honor, actually, on  
14 that point, and I want to point out that I recognize that  
15 procedurally what we did as Plaintiffs was a little unorthodox  
16 in a Cross-Motion for Summary Judgment, and maybe we were  
17 rushing a bit to get this going. But at the same time,  
18 there -- there are clearly issues that you've brought up that  
19 were not raised in the underlying briefs that need to be  
20 addressed. And the issue of standing being one of them.

21 The way we interpret, really, the issue of the fact  
22 that she hasn't been charged, the fact that she's been deprived  
23 of the firearm in the same fashion of the prior restraint case  
24 in speech -- the free speech case, it's like saying you're not  
25 allowed to even speak on this matter, it's very similar in that



1 sense.

2 And while they have sort of -- the opposing side has  
3 made some hay of how we applied First Amendment doctrine, it's  
4 clear since D.C. v Heller, when you start looking at these  
5 Circuit Court opinions, that they're really starting to apply  
6 principles that are borrowed from First Amendment case -- case  
7 law.

8 And I think the idea of the Government being able to  
9 shut down a person's right to ever acquire a firearm legally  
10 is, in and of itself, a violation of that constitutional  
11 individual right to own and possess a firearm.

12 So thank you.

13 THE COURT: And you said you were kind of in a hurry  
14 to get -- to get this filed. So is there some Statute of  
15 Limitations that's -- that's --

16 MR. RAINEY: No, no, Your Honor.

17 THE COURT: -- an issue or --

18 MR. RAINEY: I think we -- we were pretty targeted in  
19 the way that we pled the case. And I -- looking back now, I  
20 think all these issues being raised, I'm thinking maybe we  
21 should have just done an opposition to their Motion to Dismiss,  
22 and allow more discovery, and kind of move through the case in  
23 normal channels rather than do a Cross-Motion for Summary  
24 Judgment. Because there are issues that, as you sort of --  
25 with any constitutional thing -- as you sort of pull at the --

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1 the string of the sweater, you start seeing more and more items  
2 that you have to address.

3 And the 20 -- what is it -- the 30-page limitation on  
4 a motion that's -- doesn't really give us enough time to  
5 properly vent all these issues. So, thank you.

6 THE COURT: All right. Thank you. Mr. Theis?

7 MR. THEIS: Thank you, Your Honor. Several points I'd  
8 like to address.

9 First, I'd like to try to bring us back to the  
10 controlling law and the Complaint that's before the Court,  
11 because there are several policy arguments and discussions  
12 about amending the Complaint, and I'd like to focus very  
13 clearly about what the issues are here and what was pled in the  
14 Complaint.

15 What we have here is a -- is a clear understanding  
16 of -- a question about what is this inference that a seller who  
17 is selling firearms can make about someone's unlawful drug use.  
18 That seemed to be something the Court was concerned about.

19 And I think what is clear here is, the Plaintiff is  
20 the master of the Complaint, and she's pled several facts that  
21 show that she is or intends to violate the law, violate Federal  
22 law.

23 As the Court repeatedly said, marijuana is against the  
24 law under Federal law. So when Plaintiff argues that this  
25 is -- you know, she's not violating the law, if someone is an

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1 unlawful user, they are violating Federal law, even if it's for  
2 medical purposes under State law.

3           So what we have here is, if someone possesses a card,  
4 there is -- that specifically allows them to use marijuana  
5 under State law, the logical inference is that they are, in  
6 fact, going to use that card and use marijuana. So that is a  
7 completely logical inference for a seller to make.

8           In addition to the plain fact of that, the factual  
9 pieces, what she's alleged in her Complaint make clear that she  
10 had to go through several steps to aver to the State of Nevada  
11 that she intended to and was going to use marijuana.

12           Those facts include she had to go -- under the statute  
13 you're required to go to a physician, the physician is required  
14 to diagnose you with one of the various conditions that are --  
15 by statute that you can have that allows you to use marijuana  
16 for medical purposes under State law.

17           And in particular, the physician also has to warn the  
18 individual about the deleterious effects of marijuana, there  
19 has to be -- the disease itself has to be chronic and  
20 debilitating, and there has to be a clear understanding that,  
21 whatever -- the use of marijuana would somehow mitigate the  
22 conditions.

23           And so the Plaintiff then had to take that  
24 documentation and submit it to the State in order to say, I'm  
25 going to use marijuana to alleviate the symptoms of the

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1 condition that I have.

2           Taking those two pieces together, it's clear, this is  
3 not an unreasonable inference that a person who does that, who  
4 goes through those steps to say, I'm going to use marijuana,  
5 does, in fact, use marijuana.

6           And again, there's two different -- there's a temporal  
7 scope to this. Every year you have to renew your license. You  
8 have to go back to the State of Nevada and submit more  
9 documentation from your physician saying, my physician is  
10 telling me I need to continue to use marijuana, and that's, in  
11 fact, what she did, and that's what's alleged in the Complaint.

12           So there's no allegation about, you know, these other  
13 pieces or questions about why she got the card or the purpose  
14 for getting the card, that's not in the Complaint. What's in  
15 the Complaint is that she wanted to use marijuana, she got a  
16 card, told the State of Nevada she was going to use marijuana,  
17 and then was prohibited from purchasing a firearm because of  
18 the possession of the card.

19           So that -- I feel like the logic and the facts in the  
20 Complaint get to that inference question that the Court is  
21 concerned about.

22           And again, under (d) (3), it's just that someone needs  
23 to have reasonable cause -- seller needs to have reasonable  
24 cause to believe. All of these facts show that that was  
25 entirely reasonable for someone to believe that she was an

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1 unlawful user.

2 I also second wanted to address this -- the  
3 independent constitutional analysis. The two steps got a  
4 little bit blurred here and how we were discussing this.

5 The second -- the first step is not whether or not  
6 this case generally involves the Second Amendment, but the  
7 question is whether or not the restriction at issue here falls  
8 within the scope or is within the historical understanding of a  
9 type of restriction that the Second Amendment allows.

10 And we've cited a variety of sources in our briefs  
11 that point to the understanding of the Second Amendment right,  
12 as Heller described it, as reserved for law abiding,  
13 responsible citizens. That's the core right of the Second  
14 Amendment.

15 So for individuals who are not law abiding, who are  
16 not responsible citizens, who affirmatively tell the State of  
17 Nevada that they're going to violate Federal law, the Second  
18 Amendment does not apply to them.

19 So that is -- you don't even need to get to the  
20 scrutiny position. The restriction under the analysis of the  
21 Second Amendment, it does not apply to those individuals.

22 Second, for the scrutiny piece, we want to make -- and  
23 I would just point out on that specific point, Plaintiff  
24 doesn't, in her briefs at least, challenge that assertion. She  
25 doesn't suggest that somehow the Second Amendment didn't

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1 include, well, but if people have an exemption for medical  
2 marijuana or medical drug use or somehow had some other  
3 exemptions for violating the law, that that would be fine.  
4 That's not in the briefs.

5 All that they say is that she doesn't violate State  
6 law. But again, there is no such thing as a lawful marijuana  
7 user under Federal law.

8 THE COURT: So --

9 MR. THEIS: Yes.

10 THE COURT: -- what would be the Governmental  
11 objectives that are important and at issue here under strict  
12 scrutiny?

13 MR. THEIS: The Court -- in 922(d)(3), as in all of  
14 the Gun Control Act from 1968, the Government objective was to  
15 ensure that criminals do not possess firearms. To make sure  
16 that -- there was an interest in protecting public safety.

17 And every Court -- that's a compelling interest.  
18 That's beyond -- this is a very substantial interest that the  
19 Government has.

20 And 922(g)(3) references the Controlled Substances Act  
21 in order to determine what type of drugs and what qualifies as  
22 legal and not legal.

23 And that -- within the Controlled Substances Act is  
24 various schedules. Under Schedule I, marijuana has been on  
25 Schedule I since the beginning. It's clear that what -- from

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1 the initial putting of marijuana on Schedule I to the continued  
2 rejections of the petitions to the Attorney General and to HHS  
3 to remove marijuana from Schedule I, that there's a continuing  
4 judgment by the Federal Government, by the Attorney General, by  
5 HHS, that there is no medical use for marijuana, one, that  
6 individuals who use marijuana, as the Duty Court recognized,  
7 are more likely to have -- lack self-control.

8           And in addition, there's the pharmacological or other  
9 deleterious effects that are -- we point out in our briefs,  
10 that someone who is under the influence might more likely  
11 engage in activities that would tie back to that violent crime.

12           So that -- that's the fit that we're -- we're looking  
13 for in that intermediate scrutiny analysis is between those two  
14 different pieces. So I think that answers the Government's  
15 question -- or the Court's question about that particular  
16 question.

17           THE COURT: Well, the earlier cases that the Plaintiff  
18 was referring to were the criminal cases where someone's  
19 actually been charged with a criminal offense. We don't have  
20 that here. In those cases, intermediate scrutiny was applied.

21           This is a different case in that she has not yet been  
22 charged with a criminal offense because it's more of a -- of  
23 a -- like he was saying -- perhaps a prior restraint or, not to  
24 use a legal word, but at least she has been prevented from  
25 committing what, in the Government's eyes, would be perhaps a

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1 criminal offense.

2           So how does that affect the standard that I should  
3 apply, or does it?

4           MR. THEIS: Well, Your Honor, it's -- it supports the  
5 argument that this is -- that there's no constitutional  
6 violation here.

7           In criminal cases, the burden is squarely on the  
8 Government. And it's a substantial burden, it's beyond a  
9 reasonable doubt. There has to be a wide variety of facts that  
10 are submitted that a finder of fact has to determine beyond a  
11 reasonable doubt that that person committed this crime.

12           This is a civil pre-enforcement challenge. The only  
13 burden that's relevant here is whether or not a  
14 constitutional -- a statute, or regulation, or the letter  
15 violates some provision of the constitution.

16           And she has put forth in her complaint, she's averred  
17 to this Court and to the State of Nevada that she is --  
18 falls -- she is violating the law. And that -- that -- so  
19 that's -- there's no question here about -- you know, there  
20 hasn't been a full hearing about whether or not she's an  
21 unlawful user. You don't need to do that because this is --  
22 she's the master of her Complaint and she's pled facts that  
23 show that she is an unlawful user and violates Federal law.

24           THE COURT: Well, isn't that the question? I don't  
25 think that she's alleged she's an unlawful user. If anything,

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1 she's alleged that she's not an unlawful user. What she's  
2 alleged is that she has the medical marijuana card issued by  
3 the State. She hasn't admitted that she has any marijuana, or  
4 even that she plans to possess any marijuana.

5 I realize that's the inference that the Government is  
6 asking the seller to make and, likewise, asking the Court to  
7 make now, but I don't think that the Plaintiff has admitted  
8 that that inference is correct. In fact, that's why we're here  
9 is to determine whether or not, as you say, it is a logical  
10 inference or is it not.

11 MR. THEIS: Well, and I would again go back to those  
12 two points. That if someone has a card that says you can use  
13 marijuana, the inference is that they are using marijuana. If  
14 someone tells the State of Nevada I'm going to use Nevada -- I  
15 need to use marijuana in order to alleviate a condition that I  
16 have under State law, if I -- if this person goes to the doctor  
17 and says, I want to use marijuana, and the doctor prescribes  
18 something that's submitted to the State of Nevada, all of  
19 those -- those facts build to a very reasonable inference that  
20 someone is violating Federal law.

21 THE COURT: So you're saying, in the application  
22 process to get the medical marijuana card, that she has to  
23 aver, or sign, or in some way admit or declare that she plans  
24 to use marijuana?

25 MR. THEIS: Well, what the statute says is that you

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1 need to have valid, written documentation from the physician  
2 stating that, one, they've been diagnosed with a chronic and  
3 debilitating medical condition, two, that the use of marijuana  
4 may mitigate the symptoms and, three, that the attending  
5 physician has explained the risks and benefits of the medical  
6 use. That's --

7 THE COURT: So she's not declaring she's going to --

8 MR. THEIS: Well, there's no other inference that can  
9 be drawn from that. If she submits -- she goes to her doctor  
10 and asks, I have a debilitating condition, is marijuana  
11 something I can use? And the doctor says yes, and here are the  
12 problems with using marijuana, here's this information, submit  
13 it to the State, that's -- that's a pretty reasonable inference  
14 to say that all of that leads to that one intends to use  
15 marijuana to alleviate those conditions. And that's --  
16 that's -- you know --

17 THE COURT: Are you aware -- and I realize you're from  
18 D.C. so maybe you're not -- but in your research, have you  
19 determined how long it takes to go through that process of  
20 obtaining the medical marijuana card here?

21 MR. THEIS: I don't, Your Honor. I know that in this  
22 particular case, I believe it was several months that she --  
23 between the actual submission of the application to the time  
24 that she received her -- and that it was a few months after  
25 that that she then attempted to purchase the firearm in this

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1 case.

2 THE COURT: So the likelihood that she might be doing  
3 this, getting the card just in case this -- whatever illness  
4 she has becomes intolerable enough that she needs the  
5 marijuana, that she's getting the card now before it's -- it's  
6 too late, is that something that I should consider, or not?

7 MR. THEIS: I don't think so, Your Honor. Because the  
8 statute makes clear that this is something that's about chronic  
9 or debilitating condition.

10 THE COURT: I mean, if her doctor told her, look, this  
11 is only gonna get worse, it's not gonna get better. I can give  
12 you medications. They're not -- they'll work at first but  
13 they're not going to work long-term, and eventually, you're  
14 going to need something else, do you want me to write you a  
15 prescription for this? And she says, well, I don't know. And  
16 he says, it's going to take you about seven months to get the  
17 medical marijuana card so you may want to go ahead and do it  
18 now just in case?

19 I mean, sometimes I go to the doctor, and the doctor  
20 will give me a prescription for my son's sore throat and says,  
21 if it doesn't get better in a few days, get the prescription  
22 filled. Doesn't mean I'm gonna. I'm gonna wait and see if  
23 that sore throat gets better on its own. But if it doesn't,  
24 I'm gonna get the prescription filled.

25 So is that the scenario -- you know, if that is a

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1 scenario we have here, can I even assume that? Does it matter?  
2 Should I just confine myself to the fact that she got the card  
3 regardless of how long it took to get the card?

4 MR. THEIS: I think that's correct, your Honor.  
5 Respectfully, all of those suggestions are not before -- this  
6 is not pled in the Complaint. What's pled in the Complaint is  
7 she went to a physician, she got the -- submitted the paperwork  
8 to the State and got the card.

9 There's nothing to suggest that she's -- nothing to  
10 suggest that she's not using marijuana for any particular  
11 purposes, nothing to suggest that she stopped using marijuana  
12 the day she got the card. All of -- all that we have is what,  
13 again, in the Complaint. And what is in the Complaint is  
14 enough to dismiss the case because there's nothing there  
15 that -- that would give her some sort of relief.

16 I would -- a couple of different just quick points  
17 that we talked about that were also raised. The equal  
18 protection thing, I'll just very briefly address this.

19 There's this question about whether or not, so the  
20 State of Nevada is a registered card, but other states -- that  
21 also have recognized medical marijuana under State law, but  
22 those states don't, you know, formally have registry cards, and  
23 that therefore, they're somehow being treated differently.

24 What that claim really boils down to is that  
25 individuals in the State of Nevada, it's more -- it's more

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1 difficult for them to evade the law than other states. Meaning  
2 you still have to fill out a form and submit it to the ATF --  
3 or submit it to the firearm seller when you're at the firearm  
4 licensee. The question is, are you an unlawful user of drugs,  
5 that you have to answer yes or no.

6           And if someone doesn't have a medical marijuana --  
7 they're supposed -- if they are an unlawful user of marijuana,  
8 meaning if they use marijuana at all under Federal law, they're  
9 required to answer yes to that. But that doesn't -- just  
10 because there's two different ways in which the seller can look  
11 to -- there's two different ways in which the seller can make  
12 the judgment about whether or not the person is an unlawful  
13 user of marijuana, but that doesn't create an equal protection  
14 claim. They're treated equally, same. Two -- the Federal law  
15 applies equally to both of those categories and individuals.

16           THE COURT: Did she fill out the form -- the  
17 application form, and did she indicate on the application form  
18 that she was a marijuana user?

19           MR. THEIS: She left that question blank. And I  
20 believe in her Complaint she stated she didn't --

21           THE COURT: So on that basis alone the seller could --

22           MR. THEIS: Absolutely.

23           THE COURT: -- deny her the firearm because --

24           MR. THEIS: That's correct.

25           THE COURT: -- it's an incomplete application, no?

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1 MR. THEIS: That's correct.

2 THE COURT: She might have to apply again and actually  
3 indicate on that application and have a successful application  
4 before we get to this legal issue, it appears. I -- I have to  
5 think about that.

6 MR. THEIS: That's correct, your Honor. And that is  
7 certainly -- you know, if she -- that's correct. That is  
8 another grounds or cause to dismiss this present Complaint.

9 THE COURT: With leave to amend, perhaps.

10 MR. RAINEY: If I may really quickly, Your Honor, on  
11 that point? If you read the Complaint, it actually says that  
12 she went to fill out the question, and she was stopped by  
13 Mr. Houser, and he testified that he stopped her from answering  
14 the question saying, "You have to answer this yes because I  
15 know you have that card." And that was -- that's why she  
16 didn't fill it out.

17 THE COURT: But he hasn't testified because we had --  
18 this is the first hearing I've had on this case --

19 MR. RAINEY: His -- his --

20 THE COURT: -- but he's got an Affidavit or a  
21 declaration.

22 MR. RAINEY: It's attached to the Complaint, yeah.  
23 And it includes -- and it actually cites -- and so is the  
24 application. And he specifically says that, "I told her not to  
25 fill that out because I knew that she was an unlawful user

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1 because she had a card."

2 THE COURT: Okay. So not only is she prevented from  
3 having a firearm, she's prevented from even applying for the  
4 firearm.

5 MR. RAINEY: Essentially, yes.

6 MR. THEIS: That's -- that's not correct, Your Honor.  
7 She could still --

8 THE COURT: That's not what the ATF, I think, intends,  
9 but perhaps it is. I don't know.

10 MR. THEIS: Well, no, no. She can still -- she can  
11 still apply for the -- for the -- for a firearm, absolutely.  
12 There's -- but until she is --

13 THE COURT: That's not what the seller understood the  
14 letter to say.

15 MR. THEIS: But the seller -- what the sell -- again,  
16 I want -- to go back to --

17 THE COURT: So was that a misunderstanding? Should  
18 the seller have allowed her to at least complete the  
19 application and then make the determination whether or not to  
20 approve it?

21 MR. THEIS: Congress has determined -- and this is the  
22 language of (d) (3) -- that, "Any person that the seller knows  
23 or has reasonable cause to believe is an unlawful user of a  
24 controlled substance, they can deny that person a firearm."

25 But they have almost -- they have wide, wide authority

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1 to do so. And so the question of whether or not she -- you  
2 know, she -- he stopped her from answering that question or  
3 whether -- that doesn't matter to the -- to the question before  
4 the Court, and that is, does that statute, which says you can  
5 use reasonable inferences to determine whether or not someone  
6 is an unlawful user, that that's all that -- that matters for  
7 this case.

8           And so, you know, the fact that -- because this  
9 particular seller could use a wide variety of inferences to  
10 determine whether or not the person has a reasonable cause to  
11 believe that they're an unlawful -- that they're violating  
12 Federal law by using marijuana.

13           And sellers, in fact, do that. There's -- they can do  
14 a wide -- they can make any sort of determinations they want in  
15 that purchase process regarding this particular issue.

16           I want to just get back -- briefly back, again, to  
17 this -- there's this question about -- you know, the Court  
18 suggested that there's -- that somehow, because she is using  
19 marijuana for medical purposes, or that individuals who use the  
20 card -- or have the card use the marijuana for medical  
21 purposes, that that's somehow different than other types of  
22 marijuana users.

23           And I just want to drive home again that the Federal  
24 Government is not taking that position. The policy, based on  
25 years of determinations and analysis of this, is the Federal

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1 Government looks at marijuana use as exactly the same no matter  
2 how one uses it or when one uses it.

3 And so -- but there's no diff -- all of the questions  
4 about, well, she's somehow different, that's something that  
5 she's welcome to petition Congress about and ask can we change  
6 the law and -- or go to the Attorney General or the DEA and  
7 say, move marijuana from Schedule I, but that's not the case  
8 here.

9 All -- what has -- what has been the standing policy  
10 is that marijuana cannot be used no matter what the case, even  
11 marijuana for medical purposes.

12 So that's what -- I want to keep focusing in on that  
13 particular issue because there's no distinguishing fact between  
14 these two types of users of marijuana.

15 THE COURT: So this medical marijuana card is only  
16 good for a year, right?

17 MR. THEIS: That's correct.

18 THE COURT: And has to be renewed. So if hers  
19 expires, she doesn't renew it, she goes to the seller, she gets  
20 a firearm, and the next day she reapplies for the medical  
21 marijuana card, then she wouldn't be afoul of the seller's --  
22 the seller wouldn't necessarily be in trouble, he wouldn't be  
23 charged under the Gun Control Act for having sold a firearm,  
24 but she would still be in the position of both possessing the  
25 card and the firearm. So you're saying then she would still be

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1 subject to conviction?

2 MR. THEIS: So in your hypothetical, the card has  
3 expired --

4 THE COURT: Mm-hmm.

5 MR. THEIS: -- she no longer has the card, but she  
6 goes and tries to purchase the firearm and is denied --

7 THE COURT: No, no.

8 MR. THEIS: -- or is not denied --

9 THE COURT: Not denied.

10 MR. THEIS: -- she gets the firearm.

11 THE COURT: She gets the gun, yeah.

12 MR. THEIS: So for the two different issues here. The  
13 first one is, on the seller's part, all that is incumbent upon  
14 the seller is to determine whether or not there's a reasonable  
15 basis to believe they're an unlawful user.

16 And hypothetically, you have the -- I don't -- there's  
17 nothing that would suggest immediately, from the seller's point  
18 of view, this person is a user of marijuana. So that there's  
19 nothing -- there's no issue there.

20 The question -- whether -- the second -- to your  
21 second question about the former holder of the card. All that  
22 matters is whether --

23 THE COURT: So if she was to do it in the reverse, she  
24 gets the gun first, then she applies for the medical marijuana  
25 card, but she at some point has both the medical marijuana card

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1 and a firearm. So is that the ATF's Open Letter's position  
2 that now she is in violation of -- because she is an unlawful  
3 user with a firearm?

4 MR. THEIS: Well --

5 THE COURT: Because the inference is that she is an  
6 unlawful user if she has the medical marijuana card.

7 MR. THEIS: I want to go back to the text of the  
8 letter. All that the letter is saying is -- first of all, the  
9 letter -- the vast majority of the letter, all that it does is  
10 restate the law. It says this is what (d)(3) says. You know  
11 this. This is what the regulation says. You know this.

12 THE COURT: Right. It's addressed to the seller.

13 MR. THEIS: And it's addressed to the seller, and it  
14 specifically says, any piece of information that you have that  
15 you can use is the possession of this card. And if you know  
16 that they have possession of a medical marijuana card, that  
17 that's a piece of evidence that you can use to not allow them  
18 to possess a firearm.

19 So -- so that that -- that's all that we're focused on  
20 as far as the letter is concerned. The letter is not  
21 prescriptively giving any guidance to the Department of Justice  
22 or to the public at large about who they're going to prosecute  
23 based on possessions of a -- if you have -- if you're --

24 THE COURT: But the purpose of the letter is to  
25 satisfy the important Governmental interest, which is to

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1 provide safety and prevent violent crimes --

2 MR. THEIS: Correct.

3 THE COURT: -- and prevent individuals who have both  
4 firearms and a medical marijuana card from possessing both at  
5 the same time. A valid medical marijuana card, not an expired  
6 one. A valid medical marijuana card.

7 So if you can prevent someone from getting the gun,  
8 the reason that you want to prevent them from getting the gun  
9 is because, if they do get the gun, the Government believes  
10 that they will have violated the statute by being an unlawful  
11 user in possession, right?

12 MR. THEIS: I think those are two different analyses.  
13 The first is what the letter addresses, and that's only the  
14 point of sale. And that is the focus of the letter, and that  
15 letter is fleshing out the -- how to deal with this -- this  
16 language in (d) (3) that you have a reasonable cause to believe  
17 they're violating the Federal law.

18 THE COURT: And the letter doesn't address or even  
19 intend to address the (g) (3) --

20 MR. THEIS: Right. Exactly. That's not the point --

21 THE COURT: -- language. Okay.

22 MR. THEIS: -- is that that's a separate analysis. Is  
23 if someone is violating (g) (3), you look to whether or not  
24 they're an unlawful user of a controlled substance. And  
25 that's -- that's clear. If you're possessing a gun at the same

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1 time that you're an unlawful user of a controlled substance,  
2 then that -- that you fall within that category.

3 Now, I'm not hyp -- you know, making a hypothetical  
4 about this particular Plaintiff, but in the hypothetical that  
5 you set out. That's -- that's what --

6 THE COURT: Right. But you're saying the purpose of  
7 advising the seller about what -- how they interpret the  
8 language of (g) (3) is so that the seller doesn't inadvertently  
9 enable a person from violating the -- the other subsection. So  
10 I'm --

11 MR. THEIS: Yes. It could be read that way, but I  
12 think it's clearly focused on the seller's own concerns.

13 And what animated this, obviously, was seller is  
14 saying there are now these states that have passed marijuana  
15 laws that exempt one from prosecution. So what do we do with  
16 that fact? And so that's what this -- the letter was intended  
17 to -- to address was specifically at the point of sale, do you  
18 violate (d) (3) if you know that the person has a medical  
19 marijuana card?

20 And so what the -- again, what the ATF said, and which  
21 was completely reasonable and well within the scope of their  
22 interpretation of the statute and the regulation, is that this  
23 is clearly an inference that you can make. If they've averred  
24 to the State of Nevada that they are going to use marijuana and  
25 they have a card that allows them to use marijuana, that's

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1 information that you could use in your determination of whether  
2 or not this person is an unlawful user of a controlled  
3 substance.

4           And so that -- again, that's what that -- the focus of  
5 the letter is, and that's what -- that's why the letter was  
6 sent, and that's why it addresses the issues of the sellers.

7           THE COURT: All right. Well, I appreciate both  
8 counsel's comments. I'm now inclined to look at this more as a  
9 prior restraint issue that hasn't actually been claimed yet.  
10 So I'm going to take it under advisement, I'm not going to rule  
11 now. I'm thinking perhaps this is a -- the situation where the  
12 Government's Motion to Dismiss might be granted with leave to  
13 amend, and perhaps it needs to be either pled completely  
14 different or not. But it does sound like we might be a little  
15 bit short of an actual -- of the issue that the Plaintiff  
16 intended to allege at this point because of the fact that  
17 there's -- the four corners of the Complaint is all that I'm  
18 looking at, and that's what I'm going base my determination on.

19           And just to -- I suppose just to get on the pulpit for  
20 a second and to say, again -- which I -- I find myself saying  
21 very often lately -- is that the Court's purpose is not to  
22 render rulings based on passions or emotions or what I would do  
23 if I were a legislator, because I'm not. We do have a  
24 legislative body, we do have administrative bodies. They are  
25 delegated from time to time with the authority to prescribe

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1 rules and regulations so that they can effect the purpose of  
2 the laws that are enacted by Congress and signed into law by  
3 the President.

4 And so it's not for this Court to say at this point  
5 whether or not the -- the theories of the Plaintiff I think is  
6 asking the Court to rule on are correct or not because I  
7 don't -- I'm not sure that they're properly before the Court at  
8 this point, and it's a question of whether or not they're  
9 constitutional, not whether or not I like it or don't like it.

10 So I think with that being said, it's -- it's probably  
11 premature, the Complaint, but I will look into it. I look  
12 forward to the briefing as to the standing issue still, and  
13 also as to whether or not there's a notice and comment that  
14 needs to be provided as to this particular interpretation given  
15 in the Open Letter or not, whether it's interpretative or  
16 whether it's not.

17 Mike, do we have a briefing schedule? Do we want to  
18 just have a -- since we have dual Motions to Dismiss, I think  
19 we can just do the one deadline for both to submit blind briefs  
20 on the standing and issue, as well as the Nordyke issue. And  
21 then -- I don't know. What do you all think you need? Two  
22 weeks or more? Three weeks? I don't want to cut you short.

23 MR. RAINEY: Yeah. You know, Your Honor, I -- I have  
24 a prescheduled trip to Croatia to work from our Croatian office  
25 for the next few weeks. I'm not going to be back until

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1 December 6th. And I don't think there's a rush on this. I'd  
2 prefer it if we could have something maybe --

3 THE COURT: I'm sure the Government doesn't have a  
4 rush on this because, the way it stands now, Miss Wilson cannot  
5 obtain a firearm. So if anyone has a rush --

6 MR. RAINEY: Yeah.

7 THE COURT: -- my understanding is that Miss Wilson  
8 would be the one who has --

9 MR. RAINEY: Yeah.

10 THE COURT: -- the most to lose from any delay. So  
11 it's up to you all. I know you want to take your best  
12 opportunity to explain everything to me that I need to know  
13 rather than rush through it.

14 MR. RAINEY: Right. I would prefer it be sometime  
15 like mid December, like December 15th, or even December -- you  
16 know, before Christmas, but mid December would be nice.

17 THE COURT: All right. So Mike, something right  
18 before Christmas. So -- Mr. Theis, I'm just assuming, but I  
19 should ask you, if that's all right with you, something mid  
20 December before Christmas?

21 DEPUTY CLERK: 45 days, Your Honor, would be  
22 December 17th, 2012.

23 THE COURT: All right. So December 17th at, we'll  
24 say, 4:00 p.m. so that we can get it -- so 4:00 p.m. on  
25 December 17th. What day of the week is that?

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1 DEPUTY CLERK: That is a Monday, Your Honor.

2 THE COURT: On a Monday. So you even have an extra  
3 weekend there to work on it. So Monday, 4:00 p.m. Go ahead  
4 and --

5 I'm hoping that you'll just stick to -- you know, the  
6 issues that I really need to know is the Nordyke, and the  
7 standing issue, and whether or not it's an interpretative rule  
8 or not that requires -- whether it requires comment and notice  
9 or not.

10 MR. THEIS: If I might briefly, Your Honor. So I  
11 understand the second point, the notice and comment.

12 The first comment as I understood was -- and correct  
13 me if I'm wrong -- is that -- is whether there's standing to  
14 bring (d) (3) because she is not a seller. Is that what  
15 we're -- the focus of the standing question is? Or -- I'm  
16 sorry. Or in your order were you --

17 THE COURT: That was the only one originally that I  
18 thought was an issue. Now I'm not so sure whether the --  
19 there's -- there's a standing question because she didn't  
20 complete the application. But the representation is that she  
21 was also prevented from completing the application. So maybe  
22 there's not a standing issue as to that regard, but there does  
23 seem to be as to the seller's statute, that section.

24 MR. THEIS: And the -- the Nordyke question? So is  
25 that a separate --

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1 THE COURT: So the Nordyke question is, is it a  
2 rational basis? Because that's what the En Banc Court decided,  
3 and all the other cases seem to indicate that intermediate  
4 scrutiny is correct, but we still have the Plaintiff asking for  
5 the strict scrutiny.

6 So how do I reconcile all that, keeping in mind that  
7 the other cases are not Ninth Circuit cases, and the Nordyke  
8 case is a Ninth Circuit case, which has direct precedential  
9 value on this Court.

10 MR. THEIS: So those are the three issues that we  
11 then -- as we understand -- okay.

12 THE COURT: Yeah. And if you think of something else,  
13 file leave to amend -- I mean -- leave to supplement, rather,  
14 if there's something else that you think I need to know that  
15 we -- that aren't -- isn't contained in those three.

16 But I'd prefer if you can -- if you stick to those  
17 three, keeping in mind, if you didn't put it in the Complaint,  
18 it's probably not something that needs to be argued now. And  
19 if there is no Statute of Limitations issue, then you probably  
20 can raise it later, or she could always apply again and see  
21 what happens there. That would be, I believe, a whole new  
22 cause of action and then --

23 MR. RAINEY: Your Honor, if I may. Given the  
24 discussion today, would it be appropriate for me to file a  
25 Motion to Amend at this time?

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1 THE COURT: Say that again?

2 MR. RAINEY: Would it appropriate for me to file a  
3 Motion to Request Leave to Amend the Complaint at this time?

4 THE COURT: Well, I was thinking about that, but you  
5 hadn't made that motion.

6 MR. RAINEY: I'd be happy to make that motion.

7 THE COURT: You could make that motion. I don't know  
8 if I'll address it before or after the Motion to Dismiss.

9 MR. RAINEY: Right.

10 THE COURT: I usually do address both at the same  
11 time --

12 MR. RAINEY: Okay.

13 THE COURT: -- but --

14 MR. RAINEY: I will try to get you that motion right  
15 away, and I'll also talked to my opposing counsel here and see  
16 if there's any sort of stipulation --

17 THE COURT: A stipulation is always --

18 MR. RAINEY: -- or agreement that we can --

19 THE COURT: -- something that's easier for me to sign  
20 within a day or two, obviously, yes.

21 MR. RAINEY: Okay. And I guess if that happened, then  
22 we would have to restart -- jump start everything over again.

23 THE COURT: Okay. If you want to address whether the  
24 issue that she raises is even ripe or not, you can go ahead  
25 and --

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1 MR. RAINEY: Ripeness.

2 THE COURT: -- and address that, I suppose, since the  
3 issue of her application is a ripeness question, but probably  
4 can be addressed along with standing.

5 My understanding is that what she's asserting is that  
6 she would have completed the application had she been allowed  
7 to, but that the seller did not allow her to, and that there is  
8 a declaration from the seller that justifies her position.

9 I can't tell you honestly right now, I can't remember  
10 off the top of my head if it actually says that or not. But --

11 So if you go back and look at it and that's not what  
12 it says and you want to argue ripeness, obviously, that's  
13 something that the Court would be interested in. But I -- I'm  
14 taking the Plaintiff at this point at his word as an Officer of  
15 the Court that that's, in fact, what the declaration says. If  
16 you find otherwise, you probably want to address that.

17 Anything else that you think that we should be  
18 thinking about addressing in these supplemental briefs or -- it  
19 always helps to have these hearings to help us all focus on  
20 what the actual issues are here.

21 So I'll just leave it at that, that those are the  
22 issues to be addressed. If you do find other issues that you  
23 want to address, please file leave to supplement and address  
24 separately, as a separate motion, and then address anything  
25 else that's not included in those limitations. All right.

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1 MR. THEIS: And that could be before we submit the --  
2 move to file leave to supplement?

3 THE COURT: You can just do it together.

4 MR. THEIS: Right, okay.

5 THE COURT: If I grant it then I consider it, so you  
6 would actually brief it, as well. Kind of like when you do a  
7 Motion to Amend the Complaint and you have to attach the  
8 Complaint as amended, as well, you know, do that. That way  
9 I'll have it all together.

10 MR. THEIS: All right.

11 THE COURT: Okay? Any questions? All right. So  
12 that's the date. I didn't write it down. Mike, I'm sorry,  
13 could you repeat it?

14 DEPUTY CLERK: It's December 17th, 2012 at 4:00 p.m.

15 THE COURT: Okay. So Monday, December 17th at  
16 4:00 p.m., 2012, obviously.

17 If anyone has a need to extend that deadline for  
18 whatever reason, and you can agree to a different deadline and  
19 file a stipulation, I'll sign that. It's --

20 You know, like I said, from my point of view, it's the  
21 Plaintiff's concern to get this done quicker rather than later.  
22 So if you all have a stipulation, I'll go ahead and sign that.

23 All right? Thank you very much counsel for coming in  
24 today. Court's in recess.

25 (Proceedings concluded at 10:43:20 a.m.)

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**C E R T I F I C A T E**

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I, Ellen L. Ford, court-approved transcriber, certify that the foregoing is a correct transcript transcribed from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ ELLEN L. FORD  
Ellen L. Ford

January 11, 2013  
Date

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11 **UNITED STATES DISTRICT COURT**  
12 **DISTRICT OF NEVADA**

13 S. ROWAN WILSON,  
14 Plaintiff,

15 v.

16 ERIC HOLDER, Attorney General of the  
17 United States, *et al.*,  
18 Defendants.

Case No.: 2:11-cv-1679-GMN-(PAL)

**HEARING REQUESTED**

19 **DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED**  
20 **COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

21 Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 56, Defendants, the  
22 United States of America, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the  
23 individual defendants in their official capacities, by their undersigned counsel, hereby move this  
24 Court to dismiss Plaintiff's First Amended Complaint or, in the alternative, to enter summary  
25 judgment for Defendants. A Memorandum of Points and Authorities accompanies this motion,  
26 along with an Appendix of Secondary Material and a Statement of Undisputed Material Facts.

1 Dated: January 31, 2013

Respectfully submitted,

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10 **UNITED STATES DISTRICT COURT**  
11 **DISTRICT OF NEVADA**

12 S. ROWAN WILSON,  
13 Plaintiff,

14 v.

15 ERIC HOLDER, Attorney General of the  
16 United States, *et al.*,  
17 Defendants.

Case No.: 2:11-cv-1679-GMN-(PAL)

18 **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**  
19 **PLAINTIFF'S FIRST AMENDED COMPLAINT OR,**  
20 **IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

21 **INTRODUCTION**

22 As explained in Defendants' first motion to dismiss, 18 U.S.C. § 922(g)(3) prohibits an  
23 unlawful user of a controlled substance from possessing a firearm, while § 922(d)(3) prohibits  
24 the sale of firearms by a person who knows or has reasonable cause to believe that the purchaser  
25 is an unlawful user of a controlled substance. The Controlled Substances Act classifies  
26 marijuana as a Schedule I controlled substance that cannot be lawfully prescribed and that the  
27 general public may not lawfully possess. Although a number of states, including Nevada, have  
28 exempted from state criminal prosecution certain individuals who use marijuana for medical

purposes,<sup>1</sup> these state laws do not alter the fact that marijuana possession remains prohibited under federal law. To advise federal firearms licensees (“FFLs”) of this basic fact, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) issued an Open Letter to all FFLs on September 21, 2011 (the “Open Letter”), stating that “any person who uses . . . marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of . . . a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition.” *See* First Amended Complaint (“FAC”), Dkt. No. 34, Ex. 2-B. The Open Letter further informed FFLs that “if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have ‘reasonable cause to believe’ that the person is an unlawful user of a controlled substance” and “you may not transfer firearms or ammunition to the person.” *Id.* (quoting 18 U.S.C. § 922(d)(3)).

Plaintiff S. Rowan Wilson’s First Amended Complaint cannot correct the deficiencies that doomed her original Complaint, and her newly asserted claims fare no better. Plaintiff alleges that she possesses a medical marijuana card issued by the State of Nevada and has been prevented from purchasing a handgun. She claims that Defendants—through § 922(g)(3), § 922(d)(3), an ATF regulation defining certain statutory terms, and the Open Letter—have prohibited her from exercising her Second Amendment rights. She also challenges Defendants’ actions under the First Amendment, as well as the Due Process and Equal Protection clauses of the Fifth Amendment. Plaintiff seeks a declaratory judgment, a permanent injunction, and monetary damages, but she has failed to state a claim for which relief can be granted.

As a preliminary matter, Plaintiff lacks standing. The medical marijuana registry card issued by the State of Nevada attached to Plaintiff’s FAC expired on March 10, 2012. She therefore cannot challenge any of the laws or policies that would inhibit a holder of a valid registry card from obtaining a firearm, mandating dismissal of the amended pleading. Even if

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<sup>1</sup> As discussed herein, *see infra* at 4-5, the federal government does not recognize a medical use for marijuana. Any use in this memorandum of terms such as “medical marijuana,” “medical use,” or “for medical purposes” should not be read to suggest otherwise.

1 she had a valid card, she cannot satisfy the traceability or redressability elements of standing  
2 because her harm is self-inflicted and her conduct would still be prohibited under Nevada law.

3 Even if the Court were to reach the merits of the FAC, each claim would fail. The Ninth  
4 Circuit's decision in *United States v. Dugan*, 657 F.3d 998 (9th Cir. 2011), squarely forecloses  
5 Plaintiff's Second Amendment challenge to § 922(g)(3) and imperils the remainder of the Second  
6 Amendment challenge she asserts. Moreover, if this Court were to engage in an independent  
7 Second Amendment analysis, dismissal would still be warranted, as unlawful drug users are not  
8 within the class of law-abiding, responsible citizens historically protected by the Second  
9 Amendment, and § 922(g)(3) survives any level of scrutiny in any event. Section 922(d)(3)  
10 survives for the same reasons, along with the fact there is no recognized constitutional right to  
11 sell firearms. And ATF's regulation and the Open Letter survive for all of the reasons that  
12 § 922(g)(3) and § 922(d)(3) survive.

13 Plaintiff's other constitutional challenges must similarly be dismissed. Plaintiff's First  
14 Amendment claim fails because possessing a medical marijuana card cannot be considered  
15 "expressive conduct" equivalent with speech, and in any event, any limitation on First  
16 Amendment freedoms are incidental to the important government interest underlying the  
17 restrictions on the sale of firearms to illegal drug users. Plaintiff's substantive and procedural  
18 due process claims merge with the First and Second Amendment claims, and do not adequately  
19 set forth any due process violation. Plaintiff's equal protection claim fails to allege a proper  
20 classification of a group against whom Defendants have discriminated. Finally, even if Plaintiff  
21 had stated a claim against the Defendants, no waiver of sovereign immunity allows her to  
22 recover monetary damages from the United States, as Plaintiff conceded earlier in this litigation.  
23 The Court should therefore dismiss the FAC in its entirety.

## 24 STATUTORY AND REGULATORY BACKGROUND

### 25 I. THE GUN CONTROL ACT AND THE CONTROLLED SUBSTANCES ACT

26 The Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220, included  
27 a provision—now codified at 18 U.S.C. § 922(g)—designed "to keep firearms out of the hands  
28 of presumptively risky people," including felons, the mentally ill, fugitives from justice, and

unlawful drug users. *Dickerson v. New Banner Inst.*, 460 U.S. 103, 112 n.6 (1983). Specifically, as applied to unlawful drug users, § 922(g)(3) provides that

[i]t shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)) . . . to . . . possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(3). To help effectuate the firearm exclusions in § 922(g), Congress also banned selling firearms to the same categories of presumptively risky people. As relevant here, § 922(d)(3) makes it

unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)).

*Id.* § 922(d)(3).

In addition to challenging the constitutionality of these two provisions, Plaintiff also targets 27 C.F.R. § 478.11, a regulation issued by ATF to define certain statutory terms. Specifically, the regulation defines an “[u]nlawful user of or addicted to any controlled substance” as

[a] person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time . . . .

27 C.F.R. § 478.11. Additionally, the regulation echoes §§ 922(g)(3) and 922(d)(3) by providing that a “controlled substance” is “[a] drug or other substance, or immediate precursor, as defined in . . . 21 U.S.C. § 802.” *Id.*

Section 102 of the Controlled Substances Act, in turn, defines “controlled substance” as “a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V or part B of this title [21 U.S.C. § 812].” 21 U.S.C. § 802(6). Since the enactment of the

Controlled Substances Act, marijuana (also known as cannabis) has been classified as a Schedule I drug. 21 U.S.C. § 812(c), Schedule I(c)(10). By classifying marijuana as a Schedule I drug, Congress has determined that marijuana “has a high potential for abuse,” that it “has no currently accepted medical use in treatment in the United States,” and that “[t]here is a lack of accepted safety for use of [marijuana] under medical supervision.” *Id.* § 812(b)(1)(A)-(C).<sup>2</sup> As such, Schedule I drugs, including marijuana, cannot be legally prescribed for medical use. *See* 21 U.S.C. § 829; *see also United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491 (2001) (“Whereas some other drugs can be dispensed and prescribed for medical use, . . . the same is not true for marijuana.”). Additionally, it is generally unlawful for any person to knowingly or intentionally possess marijuana. *See* 21 U.S.C. § 844(a). For Schedule I drugs like marijuana, the only exception to this ban on possession is for a federally approved research project. *See* 21 U.S.C. § 823(f); *see also Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (“By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the . . . possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study.”).

## II. NEVADA’S LAW REGARDING THE USE OF MARIJUANA

Separate and apart from federal law, the State of Nevada also criminalizes the possession of marijuana. *See Nev. Rev. Stat.* §§ 453.336. In 2000, however, Nevada’s Constitution was amended by initiative petition to add the following provision regarding the medical use of marijuana:

The legislature shall provide by law for . . . [t]he use by a patient, upon the advice of his physician, of a plant of the genus *Cannabis* for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by seizure; multiple

<sup>2</sup> The Controlled Substances Act delegates authority to the Attorney General to reschedule controlled substances after consulting with the Secretary of Health and Human Services. *Id.* § 811. The Department of Justice’s Drug Enforcement Agency (“DEA”) has repeatedly denied petitions to have marijuana removed from Schedule I, most recently in 2011. *See Notice of Denial of Petition*, 76 Fed. Reg. 40552 (July 8, 2011); *see also Gonzales v. Raich*, 545 U.S. 1, 15 & n.23 (2005). Based largely on scientific and medical evaluations prepared by the Department of Health and Human Services, DEA has consistently found that marijuana continues to meet the criteria for Schedule I control. *See* 76 Fed. Reg. at 40552.



1       sclerosis and other disorders characterized by muscular spasticity; or other  
2       conditions approved pursuant to law for such treatment.

3       Nev. Const. art. IV, § 38(a). Pursuant to this constitutional amendment, Nevada enacted  
4       legislation in 2001 that exempts the use of marijuana from state prosecution in certain  
5       circumstances. *See* Nev. Rev. Stat. § 453A. Subject to certain exceptions, the law provides that  
6       “a person who holds a valid registry identification card . . . is exempt from state prosecution for .  
7       . . [a]ny . . . criminal offense in which the possession, delivery or production of marijuana . . . is  
8       an element.” Nev. Rev. Stat. § 453A.200(1)(f).<sup>3</sup> This exemption only applies to the extent that  
9       the holder of a registry identification card: (i) engages in “the medical use of marijuana in  
10      accordance with the provisions of this chapter as justified to mitigate the symptoms or effects of  
11      the person’s chronic or debilitating medical condition;” and (ii) “do[es] not, at any one time,  
12      collectively possess, deliver or produce more than . . . one ounce of usable marijuana, three  
13      mature marijuana plants, and four immature marijuana plants.” *Id.* § 453A.200(3).

14      The law also specifies who is eligible to receive a state-issued registry identification card,  
15      requiring applicants to provide, *inter alia*, “[v]alid, written documentation from the person’s  
16      attending physician stating that . . . [t]he person has been diagnosed with a chronic or debilitating  
17      medical condition.” *Id.* § 453A.210(2)(a)(1).<sup>4</sup> An applicant must also provide documentation  
18      from his or her physician stating that “[t]he medical use of marijuana may mitigate the symptoms  
19      or effects of that condition” and that “[t]he attending physician has explained the possible risks  
20      and benefits of the medical use of marijuana.” *Id.* § 453A.210(2)(a)(2)–(3). The state-issued  
21      registry identification card is valid for one year and must be renewed by annually submitting  
22      updated written documentation from the cardholder’s attending physician, including proof that  
23      the individual continues to suffer from a chronic or debilitating medical condition. *Id.*

24      §§ 453A.220(4), 453A.230. If a cardholder is “diagnosed by the person’s attending physician as

25      <sup>3</sup> The statute specifies, however, that cardholders are not exempt from state prosecution for a  
26      number of other crimes related to marijuana use. *Id.* § 453A.300(1).

27      <sup>4</sup> The statute defines the term “chronic or debilitating medical condition” to include AIDS,  
28      cancer, and glaucoma, as well as “[a] medical condition or treatment for a medical condition that  
    produces, for a specific patient,” one or more of the following symptoms: (i) cachexia, (ii)  
    persistent muscle spasms, (iii) seizures, (iv) severe nausea, or (v) severe pain. Nev. Rev. Stat.  
    § 453A.050.

no longer having a chronic or debilitating medical condition, the person . . . shall return the[] registry identification card[] to the [State] within 7 days after notification of the diagnosis.” *Id.* § 453A.240.

Nevada’s law governing the medical use of marijuana does not purport to “legalize” medical marijuana, but rather specifies the limited circumstances under which the possession of limited amounts of marijuana for purported medical use is exempt from state prosecution. This fact is evidenced by the overall structure of the statute and by the act’s inclusion of a directive instructing the next session of the Nevada legislature to “review statistics provided by the legislative counsel bureau with respect to . . . [w]hether persons exempt from state prosecution [under] this act have been subject to federal prosecution for carrying out the activities concerning which they are exempt from state prosecution pursuant to [the act].” Act of June 14, 2001 (Assembly Bill 453), ch. 592, § 48.5. Along these lines, a one-page “Important Notice” posted on the State of Nevada’s Department of Health and Human Services, Health Division’s website advises the public that **“ISSUANCE OF A STATE OF NEVADA MEDICAL MARIJUANA REGISTRY CARD DOES NOT EXEMPT THE HOLDER FROM PROSECUTION UNDER FEDERAL LAW.”** See Nev. State Health Div., *Important Notice* (Feb. 12, 2009), <http://health.nv.gov/PDFs/MMP/ImportantNotice.pdf> (emphasis in original) [App.<sup>5</sup> at Tab 1]; Nev. State Health Div., *Program Facts 2* (Feb. 12, 2009), <http://health.nv.gov/PDFs/MMP/ProgramFacts.pdf> [App. at Tab 2] (stating, in a two-page document posted on the Health Division’s website, that “[t]he Medical Marijuana law is a state law, offering protection from state law enforcement only” and that “[t]he federal government does not recognize the state law and is not bound by it.”). A section of the Nevada Health Division’s website answering frequently asked questions also informs the public that cardholders cannot fill a prescription for medical marijuana at a pharmacy because “[t]he federal government classifies marijuana as a Schedule I drug, which means licensed medical practitioners cannot prescribe it.” Nev. State Health Div., *Medical Marijuana, Frequently Asked Questions*, No. 8, <http://health.nv.gov/>

<sup>5</sup> Pursuant to Local Rule 7-3, the United States has concurrently filed an appendix to this memorandum containing secondary materials cited herein.

MedicalMarijuana\_FAQ.htm (last updated January 17, 2013) [App. at Tab 3]. The frequently asked questions page also specifies that a patient may withdraw from the program by submitting a written statement indicating that he or she wishes to withdraw and by returning the individual's registry identification card. *Id.*, No. 12.

### III. ATF'S SEPTEMBER 2011 OPEN LETTER TO FFLS

On September 21, 2011, ATF issued an "Open Letter to All Federal Firearms Licensees." *See* FAC, Ex. 2-B. The Open Letter first notes that ATF "has received a number of inquiries regarding the use of marijuana for medicinal purposes and its applicability to Federal firearms laws" and that the "purpose of this open letter is to provide guidance on the issue and to assist [FFLs] in complying with Federal firearms laws and regulations." *Id.* The Open Letter then observes that "[a] number of States have passed legislation allowing under State law the use or possession of marijuana for medicinal purposes" and that "some of these States issue a card authorizing the holder to use or possess marijuana under State law." *Id.* The Open Letter summarizes the relevant provisions of federal law, noting: (i) that "18 U.S.C. § 922(g)(3)[] prohibits any person who is an 'unlawful user of or addicted to any controlled substance . . . ' from shipping, transporting, receiving or possessing firearms or ammunition;" (ii) that the Controlled Substances Act lists marijuana as a Schedule I controlled substance and that "there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law;" (iii) that "18 U.S.C. § 922(d)(3)[] makes it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is an unlawful user of or addicted to a controlled substance;" and (iv) that, under 27 C.F.R. § 478.11, "'an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time.'" FAC, Ex. 2-B.

The Open Letter draws two conclusions from these provisions: first, "any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition."

1 *Id.* Second, if an FFL is “aware that the potential transferee is in possession of a card authorizing  
 2 the possession and use of marijuana under State law, then [the FFL] ha[s] ‘reasonable cause to  
 3 believe’ that the person is an unlawful user of a controlled substance” and “may not transfer  
 4 firearms or ammunition to the person.” *Id.* This holds even if the potential transferee answered  
 5 “no” to Question 11(e) on ATF Form 4473,<sup>6</sup> which asks, “Are you an unlawful user of, or  
 6 addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled  
 7 substance?” *Id.*; *see also* FAC., Ex. 2-C.

### 8 PROCEDURAL HISTORY

9 Plaintiff filed her original complaint on October 18, 2011. Dkt. No. 1. Defendants  
 10 moved to dismiss on February 3, 2012. Dkt. No. 10. The Court held a hearing on Defendants’  
 11 motion on November 2, 2012. After the hearing, the parties filed a stipulation allowing Plaintiff  
 12 to file a First Amended Complaint.<sup>7</sup> Plaintiff filed the amended pleading on December 17, 2012.  
 13 Dkt. No. 34.

14 The facts alleged in Plaintiff’s Complaint are accepted as true for purposes of the  
 15 Defendants’ Motion to Dismiss. According to the First Amended Complaint, Plaintiff applied for  
 16 a medical marijuana registry card from the State of Nevada in October 2010. FAC ¶ 39. Since  
 17 the age of ten, Plaintiff has experienced severe menstrual cramps, which she describes as  
 18 “sometimes debilitating, even leading to further painful side effects, such as severe nausea and  
 19 cachexia.” FAC, Ex. 1, ¶ 20. As part of her application for a medical marijuana registry card,  
 20 Plaintiff obtained a recommendation from her doctor to use marijuana. FAC ¶ 40; Ex. 2.  
 21 Plaintiff then submitted that recommendation, along with the appropriate paperwork, to the State

22 <sup>6</sup> ATF Form 4473 is a firearms transaction record that all potential purchasers are required to  
 23 complete before receiving a firearm from an FFL. *See* 27 C.F.R. § 478.124.

24 <sup>7</sup> At the November 2, 2012 hearing, the Court granted the parties’ request for supplemental  
 25 briefing on four issues. Because the parties agreed to allow Plaintiff to amend her complaint, the  
 26 Court ordered the parties to address these issues in the motion to dismiss briefing. *See* Dkt. No.  
 27 33. Defendants have addressed the questions in the present memorandum as follows: the level of  
 28 scrutiny for Second Amendment challenges after *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012)  
 (*en banc*) is addressed at page 24; the level of deference that should be afforded to the Open  
 Letter, and whether the Letter is interpretive or legislative, is addressed at page 35; whether  
 Plaintiff has standing to assert a claim challenging § 922(d)(3) is addressed at page 11, n.9; and  
 whether Plaintiff’s claim is “ripe” because she did not answer the question on the ATF Form  
 4473 asking whether she was an unlawful drug user is addressed at page 11, n.9.

1 of Nevada. Ex. 1 ¶ 22. On May 12, 2011, Nevada issued a registry identification card to  
 2 Plaintiff. FAC ¶ 41; *see also* FAC, Ex. 1-B.

3 On October 4, 2011, Plaintiff visited Custom Firearms & Gunsmithing, a federally  
 4 licensed gun store in Moundhouse, Nevada, to purchase a handgun. In order to effect the  
 5 transaction, Plaintiff began to complete ATF Form 4473, but did not answer Question 11(e) (“Are  
 6 you an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug,  
 7 or any other controlled substance?”). *See* FAC, Ex. 1-C. Plaintiff alleges that her “natural  
 8 inclination” was to answer “no” to Question 11(e), FAC ¶ 46, but that “it had been brought to  
 9 [her] attention that ATF had “promulgated a policy whereby any person holding a medical  
 10 marijuana registry card is automatically considered an ‘unlawful user of, or addicted to  
 11 marijuana.’” FAC Ex. 1 ¶ 30. For that reason, she left Question 11(e) blank. FAC Ex. 1 ¶ 31.  
 12 When Plaintiff provided the form to Mr. Frederick Hauseur, the store’s proprietor, he informed  
 13 her that he was prohibited from selling her any firearm or ammunition. FAC Ex. 1, ¶ 32. Mr.  
 14 Hauseur and Plaintiff had known each other for nearly a year, and Mr. Hauseur was previously  
 15 aware that Plaintiff possessed a state-issued medical marijuana registry card. *Id.*; FAC Ex. 2,  
 16 ¶ 11. With that knowledge, Mr. Hauseur “refused to sell Ms. Wilson the firearm that she  
 17 requested on the grounds that she was an ‘unlawful user of a controlled substance.’” FAC Ex. 2,  
 18 ¶ 13. Plaintiff alleges that she “presently intends to acquire a functional handgun for use within  
 19 her home for self-defense but is prevented from doing so” by federal law, as implemented by  
 20 ATF. FAC ¶ 6.

21 Defendants have moved to dismiss the FAC under Federal Rule of Civil Procedure  
 22 12(b)(1) because Plaintiff lacks standing. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,  
 23 1040 (9th Cir. 2003). If the Court were to reach the merits, Defendants have moved to dismiss  
 24 under Rule 12(b)(6), which requires dismissal if the Complaint fails to state a claim upon which  
 25 relief can be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).<sup>8</sup>

26 \_\_\_\_\_  
 27 <sup>8</sup> If the Court determines that it can only dismiss the Complaint by relying on the extrinsic  
 28 sources referenced in Parts II.A.2. and II.A.3., *infra*, then the Court should treat Defendants’  
 motion as a Motion for Summary Judgment under Rule 56. To facilitate that, Defendants attach  
 a Statement of Undisputed Facts in compliance with Local Rule 56-1.

## ARGUMENT

### I. PLAINTIFF LACKS STANDING TO CHALLENGE THE STATUTES, THE REGULATION, AND ATF'S OPEN LETTER

To establish standing under Article III, a plaintiff must show that “(1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 180–81 (2000). Plaintiff fails to establish each of the requirements.<sup>9</sup> The FAC should accordingly be dismissed in its entirety, and the Court need not reach Plaintiff’s constitutional claims. *Shaw v. Terhune* 380 F.3d 473, 478 (9th Cir. 2004) (noting the “canonical admonition” that courts must “avoid considering constitutionality if an issue may be resolved on narrower grounds”).

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<sup>9</sup> At the November 2, 2012 hearing on Defendants’ motion to dismiss the original complaint, the Court asked the parties to brief whether Plaintiff, as an attempted purchaser and not a *seller* of firearms, had standing to challenge § 922(d)(3). Plaintiff lacks standing to challenge § 922(d)(3) for the three reasons set forth in this Section. But if she overcame these hurdles, the standing doctrine would likely not preclude Plaintiff’s challenge to § 922(d)(3). Though the statute is directed primarily at sellers, the scope of the prohibition on sales to unlawful drug users is a mirror image of the prohibition on receipt and possession of firearms by unlawful drug users in § 922(g)(3). At least one court has found that in that circumstance, where a statutory scheme effectively prohibits an individual from receiving and a seller from selling a firearm, a plaintiff may have standing to challenge both statutes. *See, e.g., Dearth v. Holder*, 641 F.3d 499, 500-03 (D.C. Cir. 2011) (finding that plaintiff had standing to challenge both § 922(a)(9), which prohibits a non-resident from receiving a firearm, and § 922(b)(3), which prohibits the sale of a firearm to a non-resident).

The Court also asked the parties to address whether the fact that Plaintiff failed to answer Question 11e on Form 4473 means that the case is not ripe. Tr. at 72:2-4. At the hearing, counsel for Plaintiff represented (incorrectly) that Mr. Hauser had stated in his declaration that he had “stopped” Plaintiff from answering Question 11e on Form 4473. *See* Tr. at 58:10-59:1. In fact, Mr. Hauseur’s declaration—identical versions of which are attached to Plaintiff’s original complaint and the FAC—contains no such statement. Rather, Mr. Hauseur states that he knew that Plaintiff possessed a registry card, and therefore “refused to sell Ms. Wilson the firearm that she requested *on the grounds that she was an ‘unlawful user of a controlled substance.’*” FAC Ex. 2 ¶ 13 (emphasis added). That said, whether or not Mr. Hauseur stopped her from answering the question is immaterial to the ripeness question in this case. The Open Letter states that “if you are aware that the potential transferee is in possession of a [medical marijuana registry card], then you have ‘reasonable cause to believe’ that the person is an unlawful user” of illegal drugs. FAC Ex. 2-B. Mr. Hauseur knew that Plaintiff had a card, and as a result, he denied her attempt to purchase a firearm. The answer (or lack thereof) to Question 11e is therefore irrelevant in this case and does not pose a ripeness problem.

**A. Plaintiff Cannot Establish the “Injury in Fact” Requirement Because She Lacks a Valid Medical Marijuana Card**

Each of Plaintiff’s causes of action rests on a common allegation: that Plaintiff, as a holder of a state-issued medical marijuana registry card, cannot obtain a firearm. But according to the documents attached to Plaintiff’s declaration, Plaintiff does not currently possess a valid medical marijuana registry card. That card expired on March 10, 2012. *See* FAC Ex. 1 at 10.

In order to satisfy the “injury in fact” requirement for standing in cases such as this, where declaratory and injunctive relief are sought, Plaintiff must show that she is suffering an ongoing injury or faces an immediate threat of injury. *See Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); 28 U.S.C. § 2201 (proceeding under the Declaratory Judgment Act requires “a case of actual controversy”). Past wrongs are insufficient to confer standing for purposes of obtaining injunctive relief. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 109 (1998). Because the only apparent impediment to Plaintiff’s ability to obtain a firearm has been removed since March 2012, Plaintiff is not suffering an ongoing injury, and the operative pleading lacks an “actual controversy.” Plaintiff therefore lacks standing to challenge the statutes, regulation, and the Open Letter, and the First Amended Complaint should be dismissed in its entirety.<sup>10</sup>

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<sup>10</sup> Plaintiff cannot cure this standing defect by arguing that an FFL could use the months-expired registration card as evidence of “current use” of marijuana. If an FFL were to do so, the injury would then be traceable to the FFL, and not the Government. In addition to establishing injury in fact, a plaintiff bears the burden of establishing a causal connection between the injury and the conduct complained of, as well as a likelihood that the injury would be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The Open Letter states that an FFL who is “aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State Law” has “reasonable cause to believe” that the person is an unlawful user. FAC, Ex. 2-B. An expired card is not “a card authorizing the possession and use of marijuana.” If an FFL used the expired card to justify the denial of sale, Plaintiff’s injury would stem from the actions of the FFL, not the Government. *See San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) (holding that plaintiff lacked standing to challenge legislation that, by banning certain guns, resulting in dealers raising prices on guns the plaintiffs wanted to purchase, because “nothing in the Act directs manufacturers or dealers to raise the price of regulated weapons”) (citing *Lujan*, 504 U.S. at 560); *Lane v. Holder*, 2012 WL 6734784, at \*4 (4th Cir. Dec. 31, 2012) (finding that any harm to potential firearms purchasers created by transfer fees imposed by FFLs “result[] from the actions of third parties not before this court, [and as such] plaintiffs are unable to demonstrate traceability”). Because the purported injury would not be directly linked to Defendants’ actions, the causation and redressability prongs of Article III standing would not be met.



**B. Plaintiff Cannot Satisfy the Traceability Elements of Standing Because Her Injury is Self-Inflicted**

Even if Plaintiff had a valid registry card, she would still lack standing because her injury is self-inflicted. Because Plaintiff's past inability to acquire a firearm stemmed from her own decision to retain her card, any injury she suffers is traceable not to Defendants, but to her own decisionmaking, and is therefore insufficient to confer standing to prosecute her claims. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (finding that "self-inflicted injuries" failed to meet causation element of standing); *Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("[S]elf-inflicted harm doesn't satisfy the basic requirements for standing."); *cf. Yancey*, 621 F.3d at 687 (because § 922(g)(3) extends only to current users, "[defendant] himself controls his right to possess a gun; the Second Amendment, however, does not require Congress to allow him to simultaneously choose both gun possession and drug abuse"). The existence of a viable alternative to the alleged injury is significant, because "Article III standing ultimately turns on whether a plaintiff gets something other than moral satisfaction if the plaintiff wins." *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 122 (2d Cir. 2009) (internal citation and punctuation omitted); *Fire Equip. Mfrs. Ass'n v. Marshall*, 679 F.2d 679, 682 n.5 (7th Cir. 1982) ("[P]etitioners cannot allege an injury from one of the options where they can choose another which causes them no injury."). Individuals who hold valid state-issued medical marijuana cards are either unlawful drug users or are holding cards that serve them no purpose. These individuals have a choice: they can either retain their Nevada-issued medical marijuana card and forfeit the right to acquire a firearm, or they can refrain from using marijuana, return their card to the State, and regain the right to acquire a firearm. Either way, individuals such as Plaintiff cannot seek an injunction or declaratory relief against the Government for an injury entirely of their own design.

**C. Plaintiff Cannot Satisfy the Traceability or Redressability Elements of Standing Because She Has Not Challenged Nevada's Prohibition on the Possession of a Firearm by an "Unlawful User"**

Under Nevada law, "[a] person shall not own or have in his or her possession or under his or her custody or control any firearm if the person . . . [i]s an unlawful user of, or addicted to,



any controlled substance.” Nev. Rev. Stat. § 202.360(1)(c).<sup>11</sup> Like § 922(g)(3), the Nevada statute defines “controlled substance” in terms of the Controlled Substances Act. *Id.* § 202.360(3)(a) (citing 21 U.S.C. § 802(6)). FFLs are prohibited from selling a firearm to an individual “where the purchase *or possession* by such person of such firearm would be in violation of any State law.” 18 U.S.C. § 922(b)(2) (emphasis added). Thus, if § 922(g)(3), § 922(d)(3), 27 C.F.R. § 478.11, and the Open Letter were all found unconstitutional, Plaintiff still could not possess a firearm under Nevada law or purchase a firearm from an FFL under § 922(b)(2). Plaintiff therefore cannot show that her alleged harm is caused by operation of the challenged federal laws. Nor would a favorable decision by this Court redress Plaintiff’s claimed Second Amendment injury.<sup>12</sup>

First, Plaintiff’s injury—the inability to obtain a firearm—is not “fairly traceable” to Defendants’ conduct. In analyzing traceability, courts must determine whether “the line of causation between the illegal conduct and injury [is] too attenuated.” *Allen v. Wright*, 468 U.S. 737, 752 (1984). As relevant here, both Federal and Nevada law prohibit possession of a firearm by an “unlawful user” of a controlled substance. The state law prohibition undercuts the argument that Plaintiff’s injury is traceable strictly to the challenged federal laws and not “th[e] result [of] the independent action of some third party not before the court.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) (the presence of state law banning conduct similar to conduct addressed by a federal law undermined traceability);<sup>13</sup> *see also Pritikin v. Department of Energy*, 254 F.3d 791,

<sup>11</sup> *Gallegos v. State*, 163 P.3d 456 (Nev. 2007), invalidated paragraph b of NRS 202.360(1) as unconstitutionally vague because it did not define “fugitive from justice.” That holding does not affect the section at issue here, NRS 202.360(1)(c). *See Pohlman v. State*, 268 P.3d 1264, 1265 n.1 (Nev. 2012) (recognizing that paragraphs within NRS 202.360(1) other than NRS 202.360(1)(b) were not invalidated by *Gallegos*).

<sup>12</sup> According to the Supreme Court, the “fairly traceable” and “redressability” components of standing are two distinct “facets of a single causation requirement.” *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). “To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested.” *Id.*

<sup>13</sup> Though *San Diego County Gun Rights Committee* predates *Heller*, the Ninth Circuit’s conclusion that the plaintiffs’ alleged injuries were not “fairly traceable” to the challenged federal law, 98 F.3d at 1130, is unaffected by *Heller*’s analysis.

1 797 (9th Cir. 2001) (private citizen suing the Department of Energy and individual governmental  
 2 officers to compel funding of medical monitoring program failed to meet Article III standing on  
 3 the traceability and redressability prongs because another agency, not before the court, decides  
 4 whether to implement the program).

5 Second, an order from this Court granting Plaintiff's requested relief would not redress  
 6 Plaintiff's alleged injuries. If the Court invalidated the federal statutes, the regulation and the  
 7 Open Letter, the Nevada law prohibiting possession of a firearm by an "unlawful user" would  
 8 remain intact, as would the requirement that FFLs could not sell a firearm to someone violating  
 9 state law. *See White v. United States*, 2009 WL 173509 at \*5 (S.D. Ohio Jan. 26, 2009) (holding  
 10 that plaintiffs' injury was not caused by the Animal Welfare Act, as cockfighting was banned in  
 11 all fifty states); *see also Midwest Media Prop. L.L.C. v. Symmes Twp.*, 503 F.3d 456, 461-63 (6th  
 12 Cir. 2007) (finding that plaintiffs failed to establish redressability when they challenged  
 13 township's zoning regulations prohibiting off-premises signs, because plaintiffs' rejected  
 14 applications for off-premises signs had been, or could have been, rejected for violations of  
 15 township's height/size restrictions and plaintiffs had not challenged those restrictions); *cf. San*  
 16 *Diego County Gun Rights*, 98 F.3d at 1130. Because there is an additional barrier to Plaintiff  
 17 possessing or purchasing a handgun, the Court cannot redress her alleged injury in this lawsuit.

## 18 **II. PLAINTIFF'S SECOND AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED**

19 Even if Plaintiff had standing to bring her claims, each would fail. Her Second  
 20 Amendment claims fail because the Ninth Circuit has held that Congress did not violate the  
 21 Second Amendment by prohibiting unlawful drug users from possessing firearms. *See United*  
 22 *States v. Dugan*, 657 F.3d 998 (9th Cir. 2011). This binding holding applies to all unlawful drug  
 23 users, even those whose marijuana use is exempt from state prosecution. Even if the Ninth  
 24 Circuit had not already upheld 18 U.S.C. § 922(g)(3) against a Second Amendment challenge,  
 25 Plaintiff's challenge to this provision would still fail because it proscribes activity that falls  
 26 outside the scope of the Second Amendment's protections. In any event, because prohibiting  
 27 possession of firearms by unlawful drug users, including marijuana users, substantially relates to  
 28 the important governmental interests in combatting violent crime and protecting public safety, 18

U.S.C. § 922(g)(3) does not violate Plaintiff’s Second Amendment rights. Plaintiff’s challenge to § 922(d)(3) similarly fails, as the Second Amendment does not protect a right to sell firearms. Moreover, because § 922(g)(3)—which prohibits unlawful drug users’ firearm *possession*—does not violate the Second Amendment, the fact that § 922(d)(3) might prevent unlawful drug users from *acquiring* firearms does not render that provision constitutionally suspect. Finally, for the same reasons that § 922(g)(3) and § 922(d)(3) do not violate the Second Amendment, ATF’s regulation defining terms in the two statutes and the agency’s interpretation of the laws in the Open Letter are also constitutional. In particular, the interpretation of these statutes as set forth in the Open Letter is entirely reasonable and properly tailored to the compelling government interests at issue here.

**A. 18 U.S.C. § 922(g)(3), as Implemented and Interpreted by ATF, Does Not Violate the Second Amendment.**

**1. Plaintiff’s Second Amendment Challenge to § 922(g)(3) is Foreclosed by the Ninth Circuit’s Decision in *Dugan*.**

The Second Amendment provides: “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), after determining that the Second Amendment confers an individual right to keep and bear arms, *Id.* at 595, the Supreme Court held that “the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” *Id.* at 635. The Court’s holding was narrow and addressed only the “core” right of “law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 634–35 (emphasis added).

The Supreme Court also took care to note that, like other constitutional rights, the right to keep and bear arms is “not unlimited.” *Id.* at 626. Although the Supreme Court declined to “undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment,” it cautioned that “nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626–27. The Court clarified

1 that it was “identify[ing] these presumptively lawful regulatory measures only as examples” and  
 2 that its list was not “exhaustive.” *Id.* at 627 n.26; *see also McDonald v. City of Chicago*, 130 S.  
 3 Ct. 3020, 3047 (2010).

4 Following *Heller*, numerous Second Amendment challenges have been raised against  
 5 § 922(g)(3), and not one has succeeded. *See, e.g., United States v. Yancey*, 621 F.3d 681, 683,  
 6 687 (7th Cir. 2010) (holding that § 922(g)(3) was “equally defensible” as, and analogous to, the  
 7 categorical bans described as presumptively lawful in *Heller* and that “Congress acted within  
 8 constitutional bounds by prohibiting illegal drug users from firearm possession because it is  
 9 substantially related to the important governmental interest in preventing violent crime.”); *United*  
 10 *States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010) (“find[ing] that § 922(g)(3) is the type of  
 11 ‘longstanding prohibition[] on the possession of firearms’ that *Heller* declared presumptively  
 12 lawful”); *United States v. Richard*, 350 F. App’x 252, 260 (10th Cir. 2009) (unpublished); *see*  
 13 *also United States v. Patterson*, 431 F.3d 832, 835–36 (5th Cir. 2005) (holding, pre-*Heller*, that  
 14 although the Fifth Circuit recognized an individual right to bear arms, a criminal defendant’s  
 15 Second Amendment challenge to § 922(g)(3) was unavailing).<sup>14</sup>

16 The Ninth Circuit similarly upheld § 922(g)(3) against a Second Amendment challenge in  
 17 *Dugan*. Like other courts that have considered the issue, the Ninth Circuit found significant  
 18 *Heller*’s language describing the presumptive lawfulness of § 922(g)(1)’s prohibition on firearm  
 19 possession by felons and § 922(g)(4)’s prohibition on firearm possession by the mentally ill.  
 20 *Dugan*, 657 F.3d at 999. The Ninth Circuit found that “the same amount of danger” is presented  
 21 by allowing habitual drug users to possess firearms because “[h]abitual drug users, like career  
 22 criminals and the mentally ill, more likely will have difficulty exercising self-control,

23  
 24 <sup>14</sup> *United States v. Carter*, 669 F.3d 411 (4th Cir. 2012), is not to the contrary. There, the Fourth  
 25 Circuit found that the government had failed to meet its burden of establishing a record showing  
 26 a reasonable fit between § 922(g)(3) and the government’s important interest in public safety,  
 27 and it therefore remanded to allow the government an opportunity to substantiate the record. The  
 28 Court said that to do so “should not be difficult.” *Id.* at 419. On remand, the United States  
 “shouldered its burden of establishing that section 922(g)(3) is reasonably fitted to achieve the  
 substantial government objective of protecting the community from crime by keeping guns out  
 of the hands of those impaired by their use of controlled substances.” *United States v. Carter*,  
 2012 WL 5935710, at \*7 (S.D. W. Va. Nov. 27, 2012).

particularly when they are under the influence of controlled substances.” *Id.* The court also found an important distinction between § 922(g)(3) and the two prohibitions declared presumptively lawful by *Heller* that actually favored § 922(g)(3)’s constitutionality—namely, that “an unlawful drug user may regain his right to possess a firearm simply by ending his drug abuse,” whereas those individuals who have been convicted of a felony or committed to a mental institution generally face a lifetime ban. *Id.* The court therefore concluded that “[b]ecause Congress may constitutionally deprive felons and mentally ill people of the right to possess and carry weapons . . . Congress may also prohibit illegal drug users from possessing firearms.” *Id.*

Although it is not evident from the face of the opinion, Dugan, like Plaintiff, raised arguments relating to his possession of a state-issued card exempting him from state prosecution for using marijuana for medical purposes. *See* Brief for Appellant at 59, *Dugan*, 657 F.3d 998 (No. 08-10579), ECF No. 57 (“Here, Mr. Dugan was . . . licensed to grow and use medical marijuana.”). Indeed, Dugan’s central argument in his Second Amendment challenge was that “millions of Americans peacefully engage in the unlawful use of marijuana—and millions more do so legally under state medical marijuana laws—without engaging in any behavior that would provide a legitimate basis for excluding them from the reach of the Second Amendment.” *Id.* at 57. The Ninth Circuit, however, treated Dugan’s status as a medical marijuana cardholder as irrelevant to his Second Amendment claim—and rightly so. Congress has determined that marijuana “has no currently accepted medical use in treatment in the United States,” 21 U.S.C. § 812(b)(1)(B), and has accordingly specified that it may not be validly prescribed or lawfully possessed, *Id.* §§ 829, 844(a). Although several states, including Nevada, have taken a different view of marijuana’s potential medical benefits, it is well settled that Congress has authority under the Commerce Clause to criminalize marijuana possession, even if such possession is not also illegal under state law. *See Gonzales v. Raich*, 545 U.S. 1 (2005); *see also Raich v. Gonzales* (“*Raich II*”), 500 F.3d 850, 861–64 (9th Cir. 2007) (holding, on remand from the Supreme Court, that there is no Ninth Amendment or substantive due process right to use marijuana for claimed medical purposes). All marijuana users are therefore unlawful users of a controlled substance, and *Dugan*’s holding that Congress may “prohibit illegal drug users from

possessing firearms” without violating the Second Amendment applies equally to all marijuana users. 657 F.3d at 999–1000; *see also United States v. Stacy*, 2010 WL 4117276, at \*7 (S.D. Cal. Oct. 18, 2010) (noting, in the course of rejecting a Second Amendment challenge to § 922(g)(3), that “[t]he fact that this particular case involves the alleged lawful use of marijuana under state law does not have any bearing on the presumptively lawful nature of the restriction”). Accordingly, Plaintiff’s claim that her Second Amendment rights have been violated by § 922(g)(3) must fail.

**2. Even if *Dugan* Did Not Foreclose Plaintiff’s Challenge, Her Claim Would Still Fail, Because Unlawful Drug Users, Including Those Who Comply with State Medical Marijuana Laws, Fall Outside the Scope of the Second Amendment.**

Because *Dugan* resolves Plaintiff’s Second Amendment challenge to § 922(g)(3), the Court need not undertake an “independent” constitutional analysis of the statute. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 778 (2005) (doctrine of constitutional avoidance cautions courts to avoid making unnecessary constitutional determinations). Nonetheless, even if the Court were to engage in such an analysis, Plaintiff’s claim would still fail.

Several courts have established a two-step approach to Second Amendment challenges to federal statutes and regulations. *See, e.g., Heller v. District of Columbia*, 670 F.3d 1244, 1252–53 (D.C. Cir. 2011) (“*Heller II*”); *Ezell v. City of Chicago*, 651 F.3d 684, 701–04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). Under this approach, “[w]e ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny.” *Heller II*, 670 F.3d at 1253. Plaintiff’s claim fails both parts of the analysis because unlawful drug users are not within the class of law-abiding, responsible citizens historically protected by the Second Amendment, and because, in any event, § 922(g)(3) survives the appropriate level of scrutiny.

As noted earlier, *Heller*’s holding was relatively narrow, recognizing only the “core” right of “*law-abiding*, responsible citizens to use arms in defense of hearth and home.” 554 U.S. at

634–35 (emphasis added). Given this narrow holding, as well as the Court’s recognition that categorical prohibitions on firearm possession by felons and the mentally ill are presumptively lawful, it is clear that *Heller*’s determination that the Second Amendment confers an individual right to keep and bear arms cannot be misconstrued as recognizing a right for all individuals to possess firearms under any circumstances. Rather, *Heller*’s carefully crafted articulation of the right at the core of the Second Amendment acknowledges that the Anglo-American right to arms that was incorporated into the Bill of Rights was subject to certain well-recognized exceptions.<sup>15</sup> Given the relatively recent history of federal enactments disqualifying felons and the mentally ill from possessing weapons,<sup>16</sup> *Heller* also teaches that “exclusions [from the right to bear arms] need not mirror limits that were on the books in 1791,” when the Second Amendment was enacted. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (*en banc*); *see also id.* at 640 (“[*Heller*] tell[s] us that statutory prohibitions on the possession of weapons by some persons are proper—and . . . that the legislative role did not end in 1791. That *some* categorical limits are proper is part of the original meaning, leaving to the people’s elected representatives the filling in of details.”) (emphasis in original). Nevertheless, the history of the right to bear arms as it developed in England and the American colonies is consistent not only with the disarmament of convicted felons and the mentally ill, but also more broadly supports Congress’s authority to prohibit firearm possession by non-law-abiding citizens, including those who violate drug laws.

<sup>15</sup> It is “perfectly well settled” that the Bill of Rights embodies “certain guaranties and immunities which we had inherited from our English ancestors,” and “which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case.” *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). The Court similarly recognized that “[i]n incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.” *Id.*; *see also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting) (“The provisions of the Bill of Rights . . . did not create by implication novel individual rights overturning accepted political norms.”).

<sup>16</sup> *See Skoien*, 614 F.3d at 640–41 (“The first federal statute disqualifying felons from possessing firearms was not enacted until 1938 . . . . [T]he ban on possession by all felons was not enacted until 1961. . . . Moreover, legal limits on the possession of firearms by the mentally ill also are of 20th Century vintage; § 922(g)(4), which forbids possession by a person ‘who has been adjudicated as a mental defective or who has been committed to a mental institution,’ was not enacted until 1968.” (citations omitted)).



1 *Heller* identified the right protected by the 1689 English Declaration of Rights as “the  
 2 predecessor to our Second Amendment.” 554 U.S. at 593. This document provided, “That the  
 3 subjects which are Protestants may have arms for their defense suitable to their conditions and as  
 4 allowed by law.” *Id.* (quoting 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689))  
 5 (emphasis added). It is undisputed that both before and after its adoption, the English  
 6 government retained the power to disarm individuals it viewed as dangerous. *Id.* at 582.  
 7 Moreover, “like all written English rights,” this right to arms “was held only against the Crown,  
 8 not Parliament,” *id.* at 593, and thus its scope was only “as allowed by law.” Significantly, the  
 9 English Declaration of Rights did not repeal the 1662 Militia Act, which authorized lieutenants  
 10 of the militia (appointed by the King) to disarm “any person or persons” judged “*dangerous to*  
 11 *the Peace of the Kingdome*,” 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.) (emphasis added), and “was  
 12 to remain in force with only insignificant changes for many years to come,” Joyce Lee Malcolm,  
 13 *To Keep and Bear Arms* 123 (1994) [App. at Tab 4]; accord Patrick J. Charles, “*Arms for Their*  
 14 *Defence*”?: *An Historical, Legal, and Textual Analysis of the English Right to Have Arms and*  
 15 *Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago*, 57  
 16 Clev. State L. Rev. 351, 373, 376, 382–83, 405 (2009). Since the act was employed against  
 17 those viewed as “disaffected or dangerous,” Charles, 57 Clev. State L. Rev. at 376–78,  
 18 individuals could be disarmed without any adjudication of wrongdoing.

19 The documentary record surrounding the adoption of the Constitution similarly confirms  
 20 that the right to keep and bear arms was limited to “law-abiding and responsible” citizens. In  
 21 other words, “it is clear that the colonists, at least in some manner, carried on the English  
 22 tradition of disarming those viewed as ‘disaffected and dangerous.’” *United States v. Tooley*, 717  
 23 F. Supp. 2d 580, 590 (S.D. W. Va. 2010). Notably, “*Heller* identified as a ‘highly influential’  
 24 ‘precursor’ to the Second Amendment the Address and Reasons of Dissent of the Minority of the  
 25 Convention of the State of Pennsylvania to Their Constituents” (the “Pennsylvania proposal”),  
 26 which “asserted that citizens have a personal right to bear arms ‘*unless for crimes committed, or*  
 27 *real danger of public injury from individuals.*’” *Skoien*, 614 F.3d at 640 (quoting *Heller*, 554  
 28 U.S. at 604; 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971)



(emphasis added)). “One reason for considering this proposal ‘highly influential,’ is that it represents the view of the Anti-federalists – the folk advocating . . . for a strong Bill of Rights.” *Tooley*, 717 F. Supp. 2d at 590. This proposal demonstrates that, at the time the Constitution was adopted, even ardent supporters of guaranteeing an individual right to keep and bear arms recognized that criminals and other dangerous individuals should not enjoy its benefits. Although the Second Amendment itself proved more “succinct[]” than the Pennsylvania proposal, *Heller*, 554 U.S. at 659 (Stevens, J., dissenting), the latter remains probative of how the Amendment’s supporters viewed the balance between public security and the right to keep and bear arms. *See id.* at 605 (reaffirming that “the Bill of Rights codified venerable, widely understood liberties”).

The Pennsylvania proposal, moreover, supports the view that “the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.” Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 *Hastings L.J.* 1339, 1360 (2009); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and Research Agenda*, 56 *UCLA L. Rev.* 1443, 1497 (2009) (“[A]ny textual or original-meaning limitations on who possesses the right will often stem from the perception that certain people aren’t trustworthy enough to possess firearms.”); *id.* at 1510 (opining that “those whose judgment is seen as compromised by mental illness, mental retardation, or drug or alcohol addiction have historically been seen as less than full rightholders”); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *Fordham L. Rev.* 487, 492 (2004); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 *Law & Contemp. Probs.* 125, 130 (1986). Additional historical support for this understanding of the right is found in nineteenth-century cases upholding state legislation restricting firearm possession by certain classes of people perceived to be dangerous. For example, the Missouri Supreme Court held in 1886 that a state law prohibiting intoxicated persons from carrying firearms did not violate the state constitutional right to keep and bear arms. *State v. Shelby*, 2 S.W. 468, 468–69 (Mo. 1886).

Courts interpreting the Second Amendment after *Heller* have recognized the importance of the Amendment's historical limitations. *See, e.g., Heller II*, 670 F.3d at 1252. For example, the First Circuit relied, in part, on historical sources in holding that the right to keep arms does not extend to juveniles. *United States v. Rene E.*, 583 F.3d 8, 15-16 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1109 (Jan. 11, 2010). The Ninth Circuit has recognized this history as well, noting that "most scholars of the Second Amendment agree that the right to bear arms was 'inextricably . . . tied to' the concept of a 'virtuous citizen[ry]' . . . and that 'the right to bear arms does not preclude laws disarming the unvirtuous citizens (*i.e.*, criminals)." *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 146 (1986)). This history is sufficient to resolve Plaintiff's challenge to § 922(g)(3). Simply put, unlawful drug users—a category that includes *all* marijuana users—are outside the class of "law-abiding, responsible" citizens historically protected by the Second Amendment. Because the right to keep arms does not extend to those who are actively engaged in illegal activity, § 922(g)(3), as interpreted by ATF, cannot violate the Second Amendment. *See United States v. Hendrix*, 2010 WL 1372663, at \*3 (W.D. Wis. Apr. 6, 2010) ("Preventing criminal users of controlled substances from possessing guns is not a restriction on the values that the Second Amendment protects, which, to repeat, is the right of law-abiding citizens to possess handguns in their homes for self-protection.").

**3. In Any Event, 18 U.S.C. § 922(g)(3) Substantially Relates to the Important Governmental Interest in Protecting Public Safety and Combating Violent Crime.**

Even if the Court were to find that § 922(g)(3) impinges upon a right protected by the Second Amendment (or declines to reach the issue), it should still uphold § 922(g)(3), as applied to all marijuana users, because the statute easily survives heightened review. In *Heller*, the Supreme Court did not specify which standard of review should be applied in Second Amendment cases, other than to rule out the use of rational-basis scrutiny. 554 U.S. at 628 & n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."). The question of the proper standard of

1 constitutional scrutiny is still unsettled in the Ninth Circuit. A panel of the Ninth Circuit moved  
 2 towards resolving this issue by holding that “only regulations which substantially burden the  
 3 right to keep and to bear arms trigger heightened scrutiny under the Second Amendment,”  
 4 although declining to decide “precisely what type of heightened scrutiny applies to laws that  
 5 substantially burden Second Amendment rights.” *Nordyke v. King*, 644 F.3d 776, 786 & n.9 (9th  
 6 Cir. 2011). However, that decision was vacated by a subsequent *en banc* decision. 681 F.3d  
 7 1041 (9th Cir. 2012). The *en banc* decision specifically declined to adopt a specific level of  
 8 scrutiny. *Id.* at 1044-45; *see id.* at 1045 (O’Scannlain, J., concurring in judgment) (noting that  
 9 the majority “fails to explain the standard of scrutiny” under which it evaluated the Second  
 10 Amendment challenge).<sup>17</sup>

11 The other courts of appeals that have addressed the standard-of-review issue have  
 12 uniformly concluded that this type of regulation is, at most, subject to intermediate scrutiny. The  
 13 Fourth Circuit, for example, declined to decide whether firearm possession by unlawful drug  
 14 users was understood to be within the scope of the Second Amendment’s guarantee at the time of  
 15 ratification, but then rejected the defendant’s claim that strict scrutiny should apply to his  
 16 challenge because he purchased the guns at issue for self-defense in the home. *United States v.*  
 17 *Carter*, 669 F.3d 411, 416-17 (4th Cir. 2012). Instead, the court applied intermediate scrutiny,  
 18 explaining that “[w]hile we have noted that the application of strict scrutiny is important to  
 19 protect the core right of self-defense identified in *Heller* . . . that core right is only enjoyed, as  
 20 *Heller* made clear, by ‘law-abiding, responsible citizens,’” which unlawful drug users “cannot  
 21 claim to be.” *Id.* at 416. The court noted that it was “join[ing] the other courts of appeals that  
 22 have rejected the application of strict scrutiny in reviewing the enforcement of § 922(g)(3), or,  
 23 for that matter, any other subsection of § 922(g).” *Id.* at 417. *See Yancey*, 621 F.3d at 683  
 24 (applying intermediate scrutiny to uphold § 922(g)(3) against a Second Amendment challenge);

25  
 26 <sup>17</sup> The *en banc* opinion arguably held that strict scrutiny would not apply. As noted by Judge  
 27 O’Scannlain’s concurrence, strict scrutiny “requires the government to show that it has taken the  
 28 least restrictive means to serve a compelling government interest.” *Id.* at 1045 n.2. Because the  
 Government did not have the opportunity to make such a showing, the majority could not have  
 applied strict scrutiny. *Id.*

1 *see also Marzzarella*, 614 F.3d at 96-97 (applying intermediate scrutiny to 922(k)); *Reese*, 627  
 2 F.3d at 802 (applying intermediate scrutiny to § 922(g)(8)); *Heller II*, 670 F.3d at 1257 (applying  
 3 intermediate scrutiny to review novel gun registration laws).

4 Notably, intermediate scrutiny is appropriate here because Plaintiff can avoid the  
 5 restriction of § 922(g)(3) simply by relinquishing her marijuana registry card and refraining from  
 6 using marijuana. The severity of the restriction is therefore not particularly substantial. *See*  
 7 *Heller II*, 670 F.3d at 1257 (“[A] regulation that imposes a substantial burden upon the core right  
 8 of self-defense protected by the Second Amendment must have a strong justification, whereas a  
 9 regulation that imposes a less substantial burden should be proportionately easier to justify.”);  
 10 *Yancey*, 621 F.3d at 686-87 (because § 922(g)(3) prohibits only *current* drug users from  
 11 possessing firearms, it is “far less onerous than those affecting felons and the mentally ill”). The  
 12 weight of this authority confirms that if the Court deems it necessary to apply a constitutional  
 13 means-end analysis, it should apply no more than intermediate scrutiny.

14 There can be no doubt that § 922(g)(3), as applied to marijuana users, satisfies  
 15 intermediate scrutiny. Under intermediate scrutiny, “a regulation must be substantially related to  
 16 an important governmental objective.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir.  
 17 2009). An important—indeed, compelling—governmental interest is at stake here—namely, the  
 18 government’s interest in protecting public safety and preventing violent crime. *See United States*  
 19 *v. Salerno*, 481 U.S. 739, 748, 750 (1987) (noting that the Supreme Court has “repeatedly held  
 20 that the Government’s regulatory interest in community safety can, in appropriate circumstances,  
 21 outweigh an individual’s liberty interest” and that the “[g]overnment’s general interest in  
 22 preventing crime is compelling”); *Schall v. Martin*, 467 U.S. 253, 264 (1984) (“The ‘legitimate  
 23 and compelling state interest’ in protecting the community from crime cannot be doubted.”); *see*  
 24 *also Carter*, 669 F.3d at 417 (“We readily conclude in this case that the government’s interest in  
 25 ‘protecting the community from crime’ by keeping guns out of the hands of dangerous persons is  
 26 an important governmental interest.”); *Yancey*, 621 F.3d at 684 (“The broad objective of § 922(g)  
 27 —suppressing armed violence—is without doubt an important one.”).

28 In evaluating the fit between the indisputably important objectives at stake and the

prohibition in § 922(g)(3), several relevant considerations affect the analysis. First, intermediate scrutiny, “by definition, allows [the government] to paint with a broader brush” than strict scrutiny. *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010) (internal quotation marks and citation omitted). Second, in order to advance its compelling interests in combating crime and protecting public safety, Congress may need to make “predictive judgments” about the risk of dangerous behavior. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 665 (1994). Such judgments are entitled to “substantial deference” by the courts because Congress is “far better equipped than the judiciary” to collect, weigh, and evaluate the relevant evidence and to formulate appropriate firearms policy in response. *Id.* at 665–66; *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (legislatures are better equipped to make sensitive policy judgments concerning the “dangers in carrying firearms and the manner to combat those risks”). Third, “the nature and quantity of any showing required by the government ‘to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.’” *Carter*, 669 F.3d at 418 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000)). Since it is hardly novel—and entirely plausible—that mixing guns and drugs poses a severe risk to public safety, the government’s burden here is relatively low. Finally, the government may carry its burden by relying on “a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require.” *Id.*

All of these sources point inexorably to the conclusion that a substantial relationship exists between § 922(g)(3), as applied to marijuana users, and Congress’s goals of protecting public safety and combatting violent crime. Congress enacted the precursor to what is now § 922(g)(3) in the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. Congressional action was prompted by the “increasing rate of crime and lawlessness and the growing use of firearms in violent crime.” H.R. Rep. No. 90-1577, at 7 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412. To meet this growing problem, Congress banned certain classes of individuals from receiving firearms shipped in interstate commerce based on its determination that access to guns by these individuals was generally contrary to the public interest. *See Huddleston v. United*

1 *States*, 415 U.S. 814, 824 (1974) (“The principal purpose of the federal gun control legislation . .  
 2 . was to [curb] crime by keeping ‘firearms out of the hands of those not legally entitled to  
 3 possess them because of age, criminal background, or incompetency.’” (quoting S. Rep. No. 90-  
 4 1501, at 22 (1968))). As the House manager stated during debate on the legislation:

5 [W]e are convinced that a strengthened [firearms control system] can significantly  
 6 contribute to reducing the danger of crime in the United States. No one can dispute the  
 7 need to prevent drug addicts, mental incompetents, persons with a history of mental  
 8 disturbances, and persons convicted of certain offenses from buying, owning, or  
 9 possessing firearms. This bill seeks to maximize the possibility of keeping firearms out  
 10 of the hands of such persons.

11 114 Cong. Rec. 21657, 21784 (1968) (quoted in *Huddleston*, 415 U.S. at 828; *Yancey*, 621 F.3d  
 12 at 686). Moreover, Congress evidenced a particular concern with marijuana use: “[w]hile the  
 13 statute swept in users of several different categories of drugs, marijuana was the only drug  
 14 specifically listed by name.” *Carter*, 669 F.3d at 417 (citing 82 Stat. 1213, 1220-21, which  
 15 prohibited receipt of firearms by any person who is “‘an unlawful user of or addicted to  
 16 marihuana or any depressant or stimulant drug . . . or narcotic drug’”).<sup>18</sup>

17 Congress is not the only legislative body to draw the conclusion that guns and drugs do  
 18 not mix. Rather, as the court in *Yancey* found significant, “many states have restricted the right  
 19 of habitual drug abusers or alcoholics to possess or carry firearms.” 621 F.3d at 684.<sup>19</sup> As noted  
 20 previously, Nevada is among the states that have codified an analogue to § 922(g)(3). *See Nev.*  
 21 *Rev. Stat. § 202.360(1)(c)*. The state legislation “demonstrate[s] that Congress was not alone in  
 22 concluding that habitual drug abusers are unfit to possess firearms.” *Yancey*, 621 F.3d at 684.

23 <sup>18</sup> As *Carter* notes in recounting § 922(g)(3)’s legislative history, the “the 1968 enactment . . .  
 24 contained a number of loopholes.” *Id.* at 417. The provision took its current shape with the  
 25 enactment of the Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 452 (1986).

26 <sup>19</sup> *See* Ala. Code § 13A-11-72(b); Ark. Code Ann. § 5-73-309(7), (8); Cal. Penal Code  
 27 § 12021(a)(1); Colo. Rev. Stat. § 18-12-203(1)(e), (f); Del. Code Ann. tit. 11, § 1448(a)(3); D.C.  
 28 Code § 22-4503(a)(4); Fla. Stat. § 790.25(2)(b)(1); Ga. Code Ann. § 16-11-129(b)(2)(F), (I), (J);  
 Haw. Rev. Stat. § 134-7(c)(1); Idaho Code Ann. § 18-3302(1)(e); 720 Ill. Comp. Stat.  
 5/24-3.1(a)(3); Ind. Code § 35-47-1-7(5); Kan. Stat. Ann. § 21-4204(a)(1); Ky. Rev. Stat. Ann.  
 § 237.110(4)(d), (e); Md. Code Ann., Public Safety, 5-133(b)(4), (5); Mass. Gen. Laws ch. 140,  
 § 129B(1)(iv); Minn. Stat. § 624.713(1)(10)(iii); Mo. Rev. Stat. § 571.070(1)(1); Nev. Rev. Stat.  
 § 202.360(1)(c); N.H. Rev. Stat. Ann. § 159:3(b)(3); N.J. Stat. Ann. § 2C:58-3(c)(2); N.C. Gen.  
 Stat. § 14-404(c)(3); Ohio Rev. Code Ann. § 2923.13(A)(4); R.I. Gen. Laws § 11-47-6; S.C.  
 Code Ann. § 16-23-30(A)(1); S.D. Codified Laws § 23-7-7.1(3); W. Va. Code § 61-7-7(a)(2),  
 (3).

1 This shared legislative judgment is amply supported by academic research and empirical  
2 studies demonstrating the heightened risk to the public safety posed by the possession of firearms  
3 by marijuana users. According to the Bureau of Justice Statistics, a 2004 survey found that  
4 “32% of state prisoners and 26% of federal prisoners said they had committed their current  
5 offense while under the influence of drugs.” Bureau of Justice Statistics, *Drugs and Crime*  
6 *Facts*, available at <http://www.bjs.gov/content/pub/pdf/dcf.pdf> [App. at Tab 5]. Marijuana,  
7 moreover, was the most frequent drug of choice: a 2002 survey of convicted jail inmates found  
8 that marijuana was the most common drug used at the time of the offense, and similar results  
9 were found among probationers. *Id.* Moreover, the Office of National Drug Control Policy’s  
10 (“ONDCP’s”) arrestee drug abuse monitoring program, which collects data in 10 cities from  
11 males 18 years and older at the point of their involvement in the criminal justice system, found  
12 that “[m]arijuana was the most commonly detected drug in all of the . . . sites in 2010.” ONDCP,  
13 *ADAM II 2010 Annual Report*, at 20 (2010), available at [http://www.whitehouse.gov/sites/](http://www.whitehouse.gov/sites/default/files/ondcp/policyand-research/adam2010.pdf)  
14 [default/files/ondcp/policyand-research/adam2010.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/policyand-research/adam2010.pdf) [App. at Tab 6]. In the ten years that  
15 ONDCP has been collecting data, “the proportion of arrestees testing positive for marijuana has  
16 never been less than 30 percent of the sample in any of the current 10 sites.” *Id.* Indeed, “[i]n  
17 2010, in 9 of the 10 sites, 40 percent or more of the arrestees reported [marijuana] use in the  
18 prior 30 days.” *Id.* at 22. This correlation between marijuana use and crime is unsurprising  
19 given the well-documented deleterious effects regular marijuana use has on an individual.  
20 Marijuana use is associated with impaired cognitive functioning, dependence, mental illness, and  
21 poor motor performance. *See* ONDCP, *Fact Sheet: Marijuana Legalization*, at 1 (Oct. 2010),  
22 available at [http://www.whitehouse.gov/sites/default/files/ondcp/Fact\\_Sheets/](http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/marijuana_legalization_fact_sheet_3-3-11.pdf)  
23 [marijuana\\_legalization\\_fact\\_sheet\\_3-3-11.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/marijuana_legalization_fact_sheet_3-3-11.pdf) [App. at Tab 7]. Marijuana intoxication “can  
24 cause distorted perceptions, difficulty in thinking and problem solving,” and “[s]tudies have  
25 shown an association between chronic marijuana use and increased rates of anxiety, depression,  
26 suicidal thoughts, and schizophrenia.” *Id.* at 2; *see also* National Institute of Drug Abuse, *Topics*  
27 *in Brief: Marijuana*, at 1 (Dec. 2011), available at [https://www.drugabuse.gov/sites/default/](https://www.drugabuse.gov/sites/default/files/marijuana_3.pdf)  
28 [files/marijuana\\_3.pdf](https://www.drugabuse.gov/sites/default/files/marijuana_3.pdf) [App. at Tab 8] (noting that marijuana can have wide-ranging effects,



1 including impaired short term memory, slowed reaction time and impaired motor coordination,  
 2 altered judgment and decision-making, and altered mood); *Id.* at 2 (“Population studies reveal an  
 3 association between cannabis use and increased risk of schizophrenia and, to a lesser extent,  
 4 depression and anxiety.”).

5 The potential risks posed by the possession of a firearm by someone who uses this mind-  
 6 altering substance are clear. Moreover, nothing in these studies indicates that the effects of  
 7 marijuana that make it dangerous for a user to possess a firearm are somehow mitigated when a  
 8 doctor has indicated that “use of marijuana may mitigate the symptoms or effects of [a chronic or  
 9 debilitating medical] condition.” Nev. Rev. Stat. § 453A.210(2)(a)(2). The documented effects  
 10 of marijuana use thus corroborate the substantial relationship between § 922(g)(3) and  
 11 Congress’s goal of protecting the public’s safety. *See Yancey*, 621 F.3d at 685 (recognizing that  
 12 “habitual drug abusers, like the mentally ill, are more likely to have difficulty exercising self-  
 13 control, making it dangerous for them to possess deadly firearms.”).

14 In addition, the limited temporal reach of § 922(g)(3) helps ensure that it bears a  
 15 reasonable fit to the ends that it serves. Unlike most of § 922(g)’s other firearm exclusions,  
 16 which may operate as lifetime bans, § 922(g)(3) only applies to those who are currently unlawful  
 17 users. *See* 27 C.F.R. § 478.11 (defining “unlawful user” so that any unlawful use must have  
 18 “occurred recently enough to indicate that the individual is actively engaged in such conduct”).  
 19 Through this feature, “Congress tailored the prohibition to cover only the time period during  
 20 which it deemed such persons to be dangerous.” *Carter*, 669 F.3d at 419. Moreover, §  
 21 922(g)(3) “enables a drug user who places a high value on the right to bear arms to regain that  
 22 right by parting ways with illicit drug use.” *Id.* The choice is the user’s, and nothing in the  
 23 Second Amendment “require[s] Congress to allow [the unlawful user] to simultaneously choose  
 24 both gun possession and drug abuse.” *Yancey*, 621 F.3d at 687.

25 Given the “substantial deference” afforded to “predictive judgments” made by Congress  
 26 in order to advance the nation’s interests, *Turner Broad. Sys.*, 512 U.S. at 665, these sources  
 27 demonstrate that § 922(g)(3), as applied to marijuana users, satisfies intermediate scrutiny. That  
 28 Plaintiff has registered to use marijuana for purported medical purposes, as opposed to



1 recreational purposes, does nothing to change the result. Plaintiff may attempt to argue (and did  
2 so in response to Defendants' first Motion to Dismiss) that § 922(g)(3) is unconstitutional as  
3 applied to her because she is a responsible marijuana user who poses no genuine threat to public  
4 safety. But such an argument is clearly precluded by the Supreme Court's recognition in *Heller*  
5 that "some categorical disqualifications are permissible" and that "Congress is not limited to  
6 case-by-case exclusions of persons who have been shown to be untrustworthy with weapons."  
7 *Skoien*, 614 F.3d at 641 (emphasis added); *see also Tooley*, 717 F. Supp. 2d at 597 ("Section  
8 922(g)(9) is of course overbroad in the sense that not every domestic violence misdemeanor  
9 who loses his or her right to keep and bear arms would have misused them against a domestic  
10 partner or other family member. Under intermediate scrutiny, however, the fit does not need to  
11 be perfect, but only be reasonably tailored in proportion to the important interest it attempts to  
12 further. As such, intermediate scrutiny tolerates laws that are somewhat overinclusive."  
13 (citations omitted)).

14 Nor can Plaintiff succeed on a Second Amendment challenge by "disagree[ing] with  
15 Congress' policy decision to link the firearms prohibition in § 922(g)(3) to the Controlled  
16 Substances Act." *Carter*, 669 F.3d at 421. As the Fourth Circuit recognized, "[i]n enacting  
17 § 922(g)(3), Congress could have chosen to reexamine the foundations of national drug policy  
18 and to identify precisely what kinds of drug users ought to be prohibited from possessing  
19 firearms. Instead, it opted, quite reasonably, to connect § 922(g)(3)'s prohibition on the carefully  
20 studied and regularly updated list of substances contained in the Controlled Substances Act." *Id.*  
21 Given that § 922(g)(3)'s means need only be reasonably tailored to its ends, this reasonable  
22 legislative judgment is entirely consistent with the Second Amendment.

23 In sum, a variety of sources, including legislative text and history, empirical evidence,  
24 case law, and common sense, demonstrate that § 922(g)(3), as applied to marijuana users,  
25 substantially relates to the indisputably important government interest in protecting public safety  
26 and preventing crime. It therefore satisfies the requirements of intermediate-scrutiny review.  
27 Consequently, even if the Court deems it necessary to apply a constitutional means-end analysis,  
28 Plaintiff's challenge to § 922(g)(3), as interpreted by ATF, must fail.

**B. 18 U.S.C. § 922(d)(3), as Implemented and Interpreted by ATF, Does Not Violate the Second Amendment.**

Given that § 922(g)(3) is consistent with the Second Amendment, Plaintiff’s challenge to § 922(d)(3) is similarly unavailing. First, § 922(d)(3)’s restriction is directed toward firearm sellers, not the putative purchaser. Nothing in *Heller* suggests that the Constitution protects a right to sell firearms; indeed, *Heller*’s language, indicating that “nothing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms,” strongly suggests otherwise. 554 U.S. at 626–27. Only one court to date appears to have considered a Second Amendment challenge to § 922(d)(3), and it found that there was no authority indicating that, “at the time of its ratification, the Second Amendment was understood to protect an individual’s right to sell a firearm.” *United States v. Chafin*, 423 F. App’x 342, 344 (4th Cir. Apr. 13, 2011) (unpublished). Second, the right of “law-abiding, responsible citizens to use arms in defense of hearth and home” that is at the “core” of the Second Amendment, *Heller*, at 634–35, “does not necessarily give rise to a corresponding right to sell a firearm,” *Chafin*, 423 F. App’x at 344.

This is not to say that restrictions on the sale of firearms could never implicate Second Amendment concerns. But § 922(d)(3) cannot not run afoul of the Second Amendment because, for all the reasons discussed above, unlawful drug users who are precluded from acquiring firearms by the statute’s operation may constitutionally be prohibited from possessing firearms. In other words, because § 922(g)(3)’s prohibition of the *possession* of firearms by unlawful drug users is consistent with the Second Amendment, § 922(d)(3)’s prohibition of the *acquisition* of firearms by these same individuals is equally consistent.

**C. 27 C.F.R. § 478.11 Does Not Violate the Second Amendment**

Similarly, nothing in the ATF’s definition of the term “unlawful user of or addicted to any controlled substance” contained in 27 C.F.R. § 478.11 runs afoul of the Second Amendment. The regulation survives for all of the reasons that the statutes survive—that is, *Dugan*’s reasoning applies, users of medical marijuana fall outside the historical understanding of the Second Amendment, and the regulation survives intermediate scrutiny. *See* Parts II.A.-II.B.

**D. The Open Letter Does Not Violate the Second Amendment**

Finally, for the same reasons that defeat Plaintiff's Second Amendment challenge to the firearm laws, Plaintiff's challenge to the Open Letter must also fail. As an initial matter, the Open Letter does not create any "new" restrictions on the possession or sale of firearms, but rather summarizes the interplay between state medical marijuana laws and the applicable federal firearm laws (§ 922(g)(3), § 922(d)(3), and 27 C.F.R. § 478.11). The Letter restates the existing law and provides guidance to FFLs in their application of the laws to new circumstances. Accordingly, all of the reasons that support the constitutionality of the firearm laws apply with equal force to the Letter. *See supra* Parts II.A.-II.C.

Even if the court were to treat the letter as an agency action independent of the statutes and the regulation, it would survive a Second Amendment challenge. Applying intermediate scrutiny, the Letter is "substantially related to an important government objective." *Stormans*, 586 F.3d at 1134. The purpose of the Letter (as with the statutes and the regulation) is the important government interest in protecting public safety and preventing violent crime in general, and in particular, "keeping guns out of the hands of dangerous persons." *Carter*, 669 F.3d at 417.<sup>20</sup> Protecting public safety is a "compelling" interest, *Salerno*, 481 U.S. at 748, and is not in any way diminished by the fact that the particular marijuana users addressed by the letter do so in compliance with state law.

The Letter is "substantially related" to that objective for several reasons. First, the Letter preserves the temporal scope of § 922(g)(3) and § 922(d)(3)—effectively limiting the restriction to cardholders who currently possess a valid card—which several courts have found persuasive in the intermediate scrutiny analysis. *See Carter*, 669 F.3d at 418; *Yancey*, 621 F.3d at 687. In order to obtain a firearm, a holder of a medical marijuana registry card need only surrender the

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<sup>20</sup> To the extent that Plaintiff intends to challenge the policy judgment regarding the use of firearms by marijuana users, as she did earlier in this case, her contentions would be better addressed to Congress, as "[u]nder the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963); *see also Turner Broad. Sys.*, 512 U.S. at 665-66 (noting that "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" complex and dynamic issues).

1 card. If the cardholder uses marijuana, then he cannot possess a firearm; if the cardholder does  
2 not use marijuana, then he possesses a useless card, and can immediately surrender the card in  
3 order to obtain the firearm. This limiting feature—which is entirely within the individual’s  
4 control—keeps the prohibitory sweep exceedingly narrow.

5 Second, ATF’s interpretation of the firearm laws expressed in the Letter is reasonable and  
6 furthers the underlying goals of the statutes in a sufficiently targeted manner. Section 922(d)(3)  
7 requires that a seller cannot sell a firearm to an individual “knowing *or having reasonable cause*  
8 *to believe*” that the individual is an unlawful user of a controlled substance. Congress did not  
9 define “knowing” or “having reasonable cause to believe.” Reasonable cause “is often proven  
10 largely through circumstantial evidence and inferences,” *United States v. Jae Gab Kim*, 449 F.3d  
11 933, 943 (9th Cir. 2006) (emphasis omitted), and as used in § 922(d)(3) does not require “actual,  
12 subjective knowledge of the purchaser’s intended illegal use.” *United States v. Johal*, 428 F.3d  
13 823, 827 (9th Cir. 2005). Section 478.11 provides that current use can be *inferred* from  
14 “evidence of a recent use or possession” or a “pattern of use or possession that reasonably covers  
15 the present time[.]” With that background in mind, possession of a medical marijuana card gives  
16 rise to a seller’s “reasonable cause to believe” that the potential buyer is a “current user” of  
17 marijuana because: (1) the card is only issued to persons who have a “chronic or debilitating  
18 medical condition,” Nev. Rev. Stat. § 453A.050, which implies a consistent pattern of use; (2)  
19 the cardholder must obtain from her physician documentation stating that the “[t]he medical use  
20 of marijuana may mitigate the symptoms or effects of [the patient’s] condition” and that “[t]he  
21 attending physician has explained the possible risks and benefits of the medical use of  
22 marijuana,” and then submit that documentation to Nevada, Nev. Rev. Stat. § 453A.210(a)(2)-  
23 (3), indicating an intent to use marijuana to alleviate the symptoms of the condition; (3) the card  
24 is only valid for one year, Nev. Rev. Stat. § 453A.220(4), which implies recent use; and (4) if the  
25 cardholder no longer has the “chronic and debilitating” condition, the cardholder must return the  
26 card to the State of Nevada within seven days, Nev. Rev. Stat. § 453A.240, which means that a  
27 valid cardholder has an immediate justification for using marijuana (under Nevada law). For  
28

these reasons, the Letter supports the underlying purpose of § 922(g)(3) and § 922(d)(3).<sup>21</sup>

To the extent that the Open Letter might be considered overinclusive—in the sense that not every possessor of a medical marijuana card will use marijuana and then, under the influence, recklessly use a firearm—intermediate scrutiny does not require a perfect fit. The fit need only be tailored in proportion to the interest it attempts to further; in other words, intermediate scrutiny tolerates a certain level of overinclusivity. *See, e.g., Tooley*, 717 F. Supp. 2d at 597 (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 490 (1989)). This is especially the case with firearm laws, which are necessarily predictive. *See Kachalsky*, 701 F.3d at 97 (“In the context of firearm regulation, the legislature is ‘far better equipped than the judiciary’ to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks.”) (quoting *Turner Broad. Sys.*, 512 U.S. at 665); *United States v. Miller*, 604 F. Supp. 2d 1162, 1172 (W.D. Tenn. 2009) (“[T]he nature of the threat posed by gun violence makes narrowing the scope of gun regulation impracticable.”). “Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.” *Turner Broad. Sys.*, 512 U.S. at 665. Congress has made the reasoned judgment that combining firearm possession with marijuana use—*any* marijuana use—will inevitably lead to heightened risk of acts of violence and threats to public safety. This “predictive judgment” is “accord[ed] substantial deference.” *Id.*; *see also Skoien*, 614 F.3d at 640 (“That some categorical limits are proper is part of the original meaning [of the Second Amendment], leaving to the people’s elected representatives the filling in of details.”).

The Open Letter furthers that purpose by ensuring that federally-licensed sellers are not

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<sup>21</sup> Because this is a civil pre-enforcement action brought by plaintiff rather than a criminal prosecution brought by the Government, whether Plaintiff actually uses marijuana is irrelevant for the purposes of Defendants’ motion to dismiss. What *is* relevant is whether it was appropriate for Mr. Hauseur to rely on Plaintiff’s possession of a medical marijuana card in determining that he had “reasonable cause to believe” that Plaintiff was an “unlawful user.” Mr. Hauseur knew that Plaintiff possessed the card and therefore “refused to sell Ms. Wilson the firearm that she requested on the grounds that she was ‘an unlawful user of a controlled substance.’” FAC Ex. 2, ¶ 13. That judgment was entirely reasonable, because possession of a card that allows one to use marijuana to treat a chronic condition certainly gives rise to a “reasonable cause to believe” that the person does, in fact, use marijuana.

erroneously transferring firearms to certain types of marijuana users, and does so without overextending the scope of the statutes and regulation.

Finally, as a more general matter, ATF's interpretation of § 922(g)(3), § 922(d)(3) and 27 C.F.R. § 478.11, as set forth in the Open Letter, is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The Open Letter merely clarifies or explains the law already in existence, and therefore is considered an "interpretative rule." See *Mora-Meraz v. Thomas*, 601 F.3d 933, 939-40 (9th Cir. 2010).<sup>22</sup> Such interpretations are "entitled to respect" under *Skidmore*, to the extent that it has the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). As noted above, the agency's interpretation is well-considered and reasonable, and should be entitled to *Skidmore* deference. In addition, the Open Letter also interprets the application of 27 C.F.R. § 478.11, and an agency's interpretation of its own regulation is entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). See *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 828-29 (9th Cir. 2012) ("[S]ubstantial deference must be given to an agency's construction of its own regulations.") (citing *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 154-55 (1991)). For all of these reasons, the Open Letter does not violate the Second Amendment.

### III. PLAINTIFF'S FIRST AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED

Plaintiff's First Amendment claim must also be dismissed. Plaintiff contends that she has a right to exercise "certain non-verbal and communicative conduct," including the acquisition and possession of a medical marijuana card, and that Defendants actions have deterred her from exercising that right. FAC ¶ 82, 94.<sup>23</sup> But this conduct can hardly be considered expressive

<sup>22</sup> Though Plaintiff alleges in the FAC that the Letter is legislative, not interpretive, FAC ¶ 69, the Letter more accurately falls into the latter category. For purposes of this case, the distinction is only relevant in determining the amount of deference afforded to the Open Letter.

<sup>23</sup> Plaintiff incorrectly suggests that her claim may be considered to be a First Amendment "retaliation claim." See AC ¶ 93-94 (apparently alleging that Defendants retaliated against Plaintiff for her possession of her medical marijuana card). Such claims typically arise in the retaliatory prosecution or the § 1983 context. See, e.g., *Lacey v. Maricopa Co.*, 693 F.3d 896 (9th Cir. 2012). Those contexts do not apply here. Needless to say, Plaintiff has not set forth facts adequate to suggest that the passage of § 922(g)(3), § 922(d)(3), the promulgation of 27 C.F.R. § 478.11, or the distribution of the Open Letter, was motivated by a retaliation for any communicative conduct by Plaintiff.

1 conduct protected by the First Amendment, and even if it were, any free speech limitation is  
2 incidental to the compelling government interests underlying the statutes, the regulation, and the  
3 Open Letter.

4 The Supreme Court has “rejected the view that an apparently limitless variety of conduct  
5 can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express  
6 an idea.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citation and internal quotation marks  
7 omitted). However, certain conduct “may be sufficiently imbued with elements of  
8 communication to fall within the scope of the First and Fourteenth Amendments.” *Id.* (citation  
9 and internal quotation marks omitted). Conduct is analyzed as speech under the First  
10 Amendment if “[1] [a]n intent to convey a particularized message [is] present, and [2] [whether]  
11 the likelihood [is] great that the message would be understood by those who viewed it.” *Spence*  
12 *v. Washington*, 418 U.S. 405, 410-11 (1974).

13 Under the first of the two *Spence* factors, Plaintiff has not adequately alleged an intent to  
14 convey a particularized message through the mere acquisition and possession of her registry  
15 card. As a preliminary matter, acquisition or possession of an item does not typically suggest  
16 expressive conduct, though the use of that item in a particular context might. For example,  
17 acquiring or possessing an American flag or a draft card is not typically conduct that rises to the  
18 level of speech. But publicly waving—or burning—the flag or the card could amount to  
19 expressive conduct. *See Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003) (citing *Johnson*,  
20 491 U.S. at 404-06); *see also Johnston v. Port Authority of New York and New Jersey*, 2011 WL  
21 3235760, at \*11 (E.D.N.Y. July 28, 2011) (mere possession of an identification card did not  
22 demonstrate an “intent to convey a particularized message”). Plaintiff must show more than  
23 mere acquisition or possession of her registry card to bring the conduct into the realm of  
24 protected speech.

25 In a similar vein, Plaintiff has not alleged that the act of acquiring or possessing a card  
26 was “conveyed” to any third party. Though she states that she has shared the fact that she has the  
27 card “with others,” FAC at ¶ 88, that is not sufficient to establish that the acquisition or  
28 possession was a communicative act. Moreover, at no point in Plaintiff’s declaration does she

1 contend that she obtained her card in order to convey a particular message. *See generally* FAC  
 2 Ex. 1. Rather, Plaintiff states that she suffered from severe and debilitating cramps that could be  
 3 treated by cannabis, and sought a doctor's recommendation to obtain a medical marijuana  
 4 registry card. *Id.* at ¶¶ 20-22. Though Plaintiff alleges in the FAC that she is "expressing her  
 5 support for and advocacy of legalization of medical marijuana" through acquisition and  
 6 possession of the card, FAC ¶ 86, that allegation cannot trump the intention of her conduct  
 7 expressed in her declaration.

8 As for the second of the *Spence* factors, it is far from likely that a person who learned that  
 9 Plaintiff possessed a medical marijuana card would understand any political message to be  
 10 inherent in that conduct. A person who learned that Plaintiff possessed the registry card would  
 11 be more likely to assume exactly what Plaintiff set forth in her declaration—that she possesses  
 12 the card in order to treat a medical condition as allowed under state law—rather than to assume  
 13 that Plaintiff is an advocate for medical marijuana.

14 But even if the acquisition and possession of a medical marijuana card did constitute  
 15 "expressive conduct," Plaintiff's First Amendment claim would fail under the appropriate  
 16 analysis. If the "regulation is related to the suppression of free expression"—that is, if it  
 17 "proscribe[s] particular conduct *because* it has expressive elements"—strict scrutiny applies.  
 18 *Johnson*, 491 U.S. at 403, 406. If not, courts apply the less stringent standard from *United States*  
 19 *v. O'Brien*, 391 U.S. 367, 377 (1968). The statute, regulation, and Open Letter were all aimed at  
 20 reducing the threat caused by gun violence, not at suppressing advocacy of legalization of  
 21 medical marijuana or any other form of speech. Accordingly, the *O'Brien* test applies.

22 "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct,  
 23 a sufficiently important governmental interest in regulating the nonspeech element can justify  
 24 incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. In particular:

25 a government regulation is sufficiently justified [1] if it is within the constitutional power of  
 26 the Government; [2] if it furthers an important or substantial governmental interest; [3] if the  
 27 governmental interest is unrelated to the suppression of free expression; and [4] if the  
 incidental restriction on alleged First Amendment freedoms is no greater than is essential to  
 the furtherance of that interest."

28 *Id.* at 377. All of these factors are met here. First, it is indisputable that the United States has the



power to regulate the possession and sale of firearms. Second, the provisions further the compelling government interest in protecting public safety and preventing violent crime. Third, that interest is unrelated to suppressing speech. Finally, to the extent Plaintiff's First Amendment freedoms have been restricted, any restriction would be *de minimis* and would be outweighed by the Government's interest in keeping firearms out of the hands of unlawful drug users.

**IV. PLAINTIFF'S SUBSTANTIVE DUE PROCESS CLAIM SHOULD BE DISMISSED AS DUPLICATIVE OF HER CLAIMS UNDER THE FIRST AND SECOND AMENDMENTS**

Plaintiff previously based her substantive due process claim on a purported fundamental right to use marijuana for medical reasons, which was expressly foreclosed by *Raich v. Gonzales*, 500 F.3d 850, 861-66 (9th Cir. 2007). In her new complaint, Plaintiff now appears to ground her substantive due process claim in her purported "right to possess a handgun under the Second Amendment" and the "fundamental right to free speech under the First Amendment." FAC ¶ 77. This latest iteration of her claim fares no better, as any infringement of Plaintiff's First and Second Amendment rights cannot provide the basis for a violation of substantive due process.

"Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing' such a claim." *Albright v. Oliver*, 510 U.S. 266, 266 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Accordingly, "if a constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997); *Fontana v. Haskin*, 262 F.3d 871, 882 (9th Cir. 2001). Since Plaintiff appears to base her substantive due process claim on rights protected by the First and Second Amendments, the claim amounts to a retread of her claims alleging violations of these specific amendments, and therefore must be dismissed. *See Denney v. DEA*, 508 F. Supp. 2d 815, 834 (E.D. Cal. 2007) (dismissing substantive due process claim "[s]ince the First Amendment provides explicit protection for the right to free speech . . . [and therefore] plaintiff may not additionally base a due process claim on a violation of his right to free speech."); *cf. Richards v. Cnty. of Yolo*, 821 F.

Supp. 2d 1169, 1177 n.8 (E.D. Cal. 2011) (“Though the right to keep and bear arms for self-defense is a fundamental right, that right is more appropriately analyzed under the Second Amendment.”) (citation and internal quotations omitted).

**V. PLAINTIFF’S PROCEDURAL DUE PROCESS MUST BE DISMISSED BECAUSE SHE HAS NOT BEEN DEPRIVED OF A CONSTITUTIONALLY-PROTECTED LIBERTY INTEREST**

Plaintiff further claims that Defendants “deprived Plaintiff of her protected liberty interest” in a “right to possess a firearm under the Second Amendment.” Plaintiff fails to state a prima facie case to establish a procedural due process claim, which requires that Plaintiff allege facts showing: “(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections.” *Kildare v. Saenz*, 325 F.3d 1078, 1085 (9th Cir. 2003).

Plaintiff’s claim cannot survive the threshold inquiry, as she has not been deprived of a constitutionally-protected liberty or property interest. *See Erickson v. United States*, 67 F.3d 858, 861 (9th Cir. 1995) (finding that the guarantee of procedural due process applies only when a constitutionally protected liberty or property interest is at stake). Plaintiff does not have a constitutional right to use marijuana. *Raich II*, 500 F.3d 850, 861-66; *see also Marin Alliance for Medical Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1157 (2011) (“Finally — and significantly — it is difficult to reconcile the purported existence of a fundamental right to use marijuana for medical reasons with Congress’ pronouncement that ‘for purposes of the [CSA], marijuana has no currently accepted medical use at all.’” (citing *Oakland Cannabis*, 532 U.S. at 491)). Moreover, as stated, users of marijuana for medical purposes, like all users of controlled substances in violation of federal law, fall outside of the scope of the Second Amendment. Plaintiff, therefore, has not shown that the government has deprived her of any constitutionally-protected liberty or property interest, and the claim must be dismissed. *See Clark K. v. Willden*, 616 F. Supp. 2d 1038, 1041-42 (D. Nev. 2007) (dismissing procedural due process claims where plaintiffs failed to set forth a proper constitutionally-protected interest).

**VI. PLAINTIFF'S EQUAL PROTECTION MUST BE DISMISSED BECAUSE SHE HAS NOT IDENTIFIED SIMILARLY SITUATED INDIVIDUALS THAT DEFENDANTS HAVE TREATED DIFFERENTLY**

Plaintiff's equal protection claim is also meritless. Plaintiff alleges that §§ 922(g)(3) and 922(d)(3), as implemented and interpreted by ATF, violate the equal protection component of the Due Process Clause. FAC ¶¶ 58-66. The Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Although this clause expressly applies only to the States, the Supreme Court has found that its protections are encompassed by the Due Process Clause of the Fifth Amendment and therefore apply to the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Congress is presumed to act within its powers when it passes legislation, however, and federal statutes challenged for denial of equal protection are entitled to deferential review as long as the "legislative classification or distinction 'neither burdens a fundamental right nor targets a suspect class.'" *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

In evaluating an equal protection challenge, a court must first determine whether a plaintiff is being treated differently from similarly situated individuals. *Gonzalez-Medina v. Holder*, 641 F.3d 333, 336 (9th Cir. 2011). The equal protection component of the Due Process Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). As a result, "[t]o establish an equal protection violation, [the plaintiff] must show that she is being treated differently from similarly situated individuals." *Gonzalez-Medina*, 641 F.3d at 336.

Plaintiff first claims that she is similarly situated to "persons who are prescribed medical marijuana in states where the obtainment of a state-issued medical marijuana card is not required." FAC ¶ 62. According to Plaintiff, because some states allow medical marijuana use without issuing registry identification cards, those medical marijuana users will be able to buy firearms more easily than people who live in states that require medical marijuana registry cards. *Id.* This claim cannot proceed. As a threshold matter, Plaintiff has not supported these conclusory allegations with any facts regarding the supposed (easier) registration requirements in

1 other states. *See Marin Alliance For Medical Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1158-  
2 59 (N.D. Cal. 2011) (rejecting equal protection claim where, *inter alia*, Plaintiff failed to present  
3 facts supporting allegations regarding differences in state medical marijuana laws).

4 In any event, even if Plaintiff could overcome this pleading defect, the claim would still  
5 fail. Plaintiff does not claim (because she cannot) that the “law is applied in a discriminatory  
6 manner or imposes different burdens on different classes of people.” *Freeman v. City of Santa*  
7 *Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). The law applies equally to all users of medical  
8 marijuana, and nothing in § 922(g)(3), 27 C.F.R. § 478.11, or the Open Letter suggests  
9 otherwise. Instead, Plaintiff’s argument is that medical marijuana users in certain states may  
10 more easily evade the law by purchasing firearms without notifying sellers that they use  
11 marijuana. This is not a proper equal protection claim, as the law facially applies to every  
12 marijuana user, even if some people are able—through deceit or fraud—to avoid prosecution or  
13 obtain a firearm. *See United States v. Hendrickson*, 664 F. Supp. 2d 793, 798 (E.D. Mich.  
14 2009) (“There is no right under the Constitution to have the law go unenforced against you, even  
15 if you are the first person against whom it is enforced . . . . The law does not need to be enforced  
16 everywhere to be legitimately enforced somewhere.” (internal quotation omitted)).<sup>24</sup>

17 Plaintiff also claims that she is “being treated differently from similarly situated persons  
18 with similar medical conditions to those of the Plaintiff.” FAC ¶ 63. According to Plaintiff,  
19 individuals who pursue methods of treatment other than the use of marijuana “have not been  
20 denied their ability to obtain handguns.” *Id.* But the class of citizens that use marijuana pursuant  
21 to state law are not similarly situated to law-abiding individuals, including those who seek  
22 treatment in compliance with federal law. It is entirely reasonable for the government to infer  
23 that those individuals who have affirmatively registered to use marijuana on the basis of chronic  
24 medical conditions are, in fact, marijuana users. And because all users of marijuana are violating  
25 federal law, they are not similarly situated to those citizens who seek medical treatment in a  
26

27 <sup>24</sup> Furthermore, a marijuana registration card is only one of many pieces of evidence that an FFL  
28 located in any state can consider in determining whether a particular buyer is an “unlawful user  
of or addicted to a controlled substance,” regardless of the state in which the sale takes place. *Id.*

manner that does not violate federal law. *See Marin Alliance*, 866 F. Supp. 2d at 1158-59 (finding that individuals whose drug use violates the Controlled Substances Act are not similarly situated to those whose use is permitted by that law). Because Plaintiff does not adequately allege that she has been “treated differently from similarly situated individuals,” *Gonzalez-Medina*, 641 F.3d at 336, she fails to state an equal protection claim.<sup>25</sup>

**VII. AS PLAINTIFF PREVIOUSLY CONCEDED, SHE CANNOT SEEK MONETARY DAMAGES AGAINST THE UNITED STATES**

Plaintiff’s First Amended Complaint purports to seek claims against the United States for monetary relief, even though Plaintiff previously conceded that claims for damages cannot proceed. *See* FAC ¶¶ 56, 65, 72, 79, 96 (alleging that Plaintiff has suffered damages “[a]s a direct and proximate result” of Defendants’ actions); Prayer for Relief ¶ 6 (seeking an award of “compensatory and punitive damages”).

The waiver of sovereign immunity claimed by Plaintiff does not apply to actions for money damages. The United States, as a sovereign, is immune from suit unless it has waived its immunity. *Dep’t of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999); *Levin v. United States*, 663 F.3d 1059, 1061 (9th Cir. 2011). The United States has not waived its sovereign immunity for damages claims based on constitutional violations. *See Dyer v. United States*, 166 F. App’x 908, 909 (9th Cir. 2006) (“To the extent [plaintiff] sought damages from the United States for allegedly violating his constitutional rights, his claim was barred by sovereign immunity.”). “A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text.” *Lane v. Peña*, 518 U.S. 187, 192 (1996).

<sup>25</sup> Even if Plaintiff could establish that she is being treated differently from other similarly-situated individuals, her equal protection claim would still fail because she cannot show that Defendants’ actions were irrational. Because the purported classifications do not target a suspect class, only rational basis would apply. *Romer*, 517 U.S. at 631. Under rational basis review, a law must be rationally related to the furtherance of a legitimate governmental interest. *Id.* As explained above, the challenged government actions satisfy the requirements of intermediate scrutiny. *See supra* Part II.A.3. By definition, then, they also satisfy the more relaxed standards of rational basis review. *See Dearth v. Holder*, --- F. Supp. 2d ---, 2012 WL 4458447, at \*12 (D.D.C. Sep. 12, 2012) (finding that because the challenged restriction survived a Second Amendment challenge under intermediate scrutiny, the restriction also survived an equal protection challenge under rational basis review).

Plaintiff seeks to avail herself of the waiver of sovereign immunity contained in Section 702 of the Administrative Procedure Act. FAC ¶ 11 (alleging that the United States “is a proper defendant in this action pursuant to 5 U.S.C. § 702”). But this waiver only applies to constitutional claims for non-monetary relief. *See* 5 U.S.C. § 702 (“An action in a court of the United States seeking relief *other than monetary damages* . . .” (emphasis added)). Plaintiff previously conceded that she could not seek money damages against the United States. *See* Reply to Def. Mot. to Dismiss (Dkt. 17) at 25 (“To the extent that the Prayer for Relief contained in Plaintiff’s Complaint seeks monetary damages, Plaintiff agrees that 5 U.S.C. § 702 does not provide for such damages.”). Accordingly, any claims seeking monetary relief from the United States, ATF, or the individual defendants in their official capacity must be dismissed.

### CONCLUSION

For the reasons stated herein, Plaintiff’s First Amended Complaint should be dismissed in its entirety, or, in the alternative, summary judgment should be entered in the favor of the United States on all of Plaintiff’s claims.

Dated: January 31, 2013

Respectfully submitted,

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10 **UNITED STATES DISTRICT COURT**  
11 **DISTRICT OF NEVADA**

12 S. ROWAN WILSON, an individual,

13 Plaintiff,

14 v.

15 ERIC HOLDER, Attorney General of the  
16 United States, et al.,

17 Defendants.  
18  
19

Case No. 2:11-cv-1679-GMN-(PAL)

**RESPONSE TO DEFENDANTS'  
MOTION TO DISMISS  
PLAINTIFF'S FIRST AMENDED  
COMPLAINT OR, IN THE  
ALTERNATIVE, FOR SUMMARY  
JUDGMENT**

**HEARING REQUESTED**

20 COMES NOW Plaintiff S. ROWAN WILSON (the "Plaintiff") by and through her  
21 counsel Charles C. Rainey of the THE LAW FIRM OF RAINEY DEVINE, and hereby submits her  
22 RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED  
23 COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT.

24 / / /

25 / / /

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28 / / /

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1 This Response is made and based upon the Memorandum of Points and Authorities  
2 attached hereto, the pleadings and papers on file herein, and any arguments to be had at the  
3 hearing of this matter.

4 DATED: February 25, 2013.

Respectfully submitted:

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1 **INTRODUCTION**

2 Defendants' Motion to Dismiss attempts to bury the fundamental and meritorious issues  
3 of this case inside a myriad of irrelevant facts and arguments. Plaintiff does not dispute that the  
4 possession of marijuana remains prohibited under federal law despite a growing number of states  
5 legalizing the possession and use of marijuana for the treatment of medical conditions. Nor is  
6 Plaintiff, by this case, attempting to claim that Defendants may not advise federal firearms  
7 licensees ("FFLs") that possession of marijuana remains illegal under federal law. Instead,  
8 Plaintiff is asserting that the Defendants' explicit direction to FFLs that they "may not transfer  
9 firearms or ammunition to [a] person" who "is in possession of a card authorizing the possession  
10 and use of marijuana under State law," is unconstitutional. *See* First Amended Complaint  
11 ("FAC"), Dkt. No. 34, Ex. 2-B. The mere fact that a person possesses a document, validly issued  
12 under the laws of his or her state and authorizing some act not compatible with federal law,  
13 without more, cannot constitute grounds for the deprivation of fundamental constitutional rights.

14 The Defendants have deprived the Plaintiff of her fundamental constitutional rights.  
15 Through 18 U.S.C. §§ 992(d)(3), 922(g)(3), and their Open Letter to all FFLs, the Defendants  
16 have deprived the Plaintiff of her rights under the First, Second, and Fifth Amendments.  
17 Dismissal of Plaintiff's claims is unwarranted as Plaintiff properly alleges each required element  
18 of her claims. Defendants' Motion to Dismiss sets forth virtually no arguments concerning  
19 Plaintiff's alleged failure to state a claim for which relief can be granted, but instead argues  
20 almost exclusively that summary judgment is appropriate because, the Defendants contend,  
21 Plaintiff's claims fail as a matter of law under *United States v. Dugan*, 657 F.3d 998 (9<sup>th</sup> Cir.  
22 2011). *Dugan*, however, is factually distinguishable from the present case in a number of  
23 important respects, which Defendants fail to address. Furthermore, summary judgment is  
24 inappropriate as genuine issues of fact remain in dispute regarding Plaintiff's claims. Therefore,  
25 Defendants' Motion must be denied and this case must be allowed to move forward.

26 **STATEMENT OF FACTS**

27 In connection with their Motion to Dismiss, Defendants' filed a Statement of Undisputed  
28 Facts (the "Statement"). Dkt. No. 37-2. Plaintiff does not dispute the Statement to the extent that

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1 it sets forth the laws governing this dispute; however, Plaintiff does dispute several other items  
2 set forth in the Statement. First, Paragraph 4 of the Statement alleges that “marijuana cannot be  
3 legally prescribed for medical use.” *Id.* at p. 3, line 3. Plaintiff agrees that marijuana cannot be  
4 legal prescribed for medical use under federal law but asserts that marijuana can be legally  
5 prescribed under many state laws. Second, Plaintiff disagrees with Paragraph 5 of the Statement  
6 to the extent that it implies Nevada’s statutes regarding medical marijuana only apply when the  
7 Registry Cardholder actually “engages in the medical use of marijuana.” *Id.* at p. 3, lines 8-10.  
8 There is no requirement in the Nevada statutes that a Registry Cardholder ever use or possess  
9 marijuana; nor is there any determination that a Cardholder will in fact obtain and use marijuana.

10 Additionally, further factual disputes exist in this matter. Specifically, factual disputes  
11 exist as to the Defendants’ intent in issuing the Open Letter and Plaintiff’s intent in obtaining a  
12 Registry Card. Plaintiff contends that by issuing the Open Letter, Defendants intended to curtail  
13 certain speech and to damage the political movement regarding the legalization of medical  
14 marijuana. Defendants’ contend that there was no such intent, alleging instead that the sole  
15 purpose in issuing the Open Letter was preventing the threat of gun crime caused by persons  
16 possessing Registry Cards. There is further dispute as to Plaintiff’s intent in obtaining her  
17 Registry Card. Plaintiff alleges that she obtained the Registry Card as part of her advocacy for  
18 the use of medical marijuana, while Defendants claim that Plaintiff obtained the Registry Card  
19 solely for medical reasons.

#### 20 **PROCEDURAL HISTORY**

21 Plaintiff does not dispute the procedural history set forth in Defendants’ Motion. In  
22 regards to the four issues which the Court requested be briefed by the parties during the  
23 November 2, 2012 hearing, Plaintiff addresses such issues as follows: the level of scrutiny for  
24 Second Amendment challenges is addressed at page 16; whether the Open Letter is legislative or  
25 interpretive is addressed at page 11; whether Plaintiff has standing to challenge 922(d)(3) is  
26 addressed at page 4, note 1; and whether Plaintiff’s claim is “ripe” is addressed at page 4, note 1.

#### 27 **LEGAL STANDARDS**

28 Defendants’ Motion purports to be a Motion to Dismiss made pursuant to F.R.C.P.

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1 12(b)(1) and 12(b)(6) and, in the alternative, a Motion for Summary Judgment made pursuant to  
2 F.R.C.P. 56. Rules 12(b)(1) and 12(b)(6) provide, respectively, that defenses of lack of subject  
3 matter jurisdiction and failure to state a claim upon which relief can be granted can be raised by  
4 motion before a responsive pleading is filed. Fed. R. Civ. Pro. 12(b). In considering a motion  
5 under Rule 12(b)(1) or 12(b)(6), the Court must accept all factual allegations as true and draw all  
6 reasonable inferences in favor of plaintiff. *Mirin v. Justices of Supreme Court of Nev.*, 415  
7 F.Supp. 1178, 1195 (D. Nev. 1976); *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9<sup>th</sup>  
8 Cir. 1999). Additionally, “[i]f, on a motion under Rule 12(b)(6) . . . matters outside the pleadings  
9 are presented to and not excluded by the court, the motion must be treated as one for summary  
10 judgment under Rule 56.” Fed. R. Civ. Pro. 12(d).

11 Rule 56 provides that “[t]he court shall grant summary judgment if the movant shows that  
12 there is no genuine dispute as to any material fact and the movant is entitled to judgment as a  
13 matter of law.” Fed. R. Civ. Pro. 56(a). Material facts are only those facts “that might affect the  
14 outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242,  
15 247, 106 S.Ct. 2505 (1986). The moving party bears the burden of showing the absence of any  
16 genuine issue of material fact. *Celotex Corp. v. Catrett*, 47 U.S. 317, 325 106 S.Ct. 2548 (1986).

17 Here, Defendants’ Motion should be considered as a motion for summary judgment  
18 rather than a motion to dismiss under Rule 12(b)(6) because the Defendants rely on matters  
19 outside of the FAC throughout the Motion. These extrinsic matters cannot be separated from the  
20 Motion so as to allow the Court to consider the Motion under Rule 12(b)(6). Defendants’ Motion  
21 only seeks dismissal under Rule 12(b)(1) in that it claims Plaintiff lacks standing under Article  
22 III. As such, the Defendants’ Motion is, for all intents and purposes, a motion for summary  
23 judgment and not a motion for dismissal under Rule 12(b)(6).

#### 24 **LEGAL ARGUMENT**

25 Defendants’ Motion must be denied on each and every ground set forth therein. First,  
26 Plaintiff has clearly satisfied the requirement to establish Article III standing. Second,  
27 Defendants’ fail to establish that there are no genuine disputes of material fact and that they are  
28 entitled to summary judgment as a matter of law. Defendants are not entitled to summary

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1 judgment because they have violated Plaintiff's Second and Fifth Amendment rights and, at the  
2 very least, a question of fact exists as to whether Defendants have violated Plaintiff's First  
3 Amendment rights.

4 **I. DEFENDANTS' MOTION TO DISMISS UNDER F.R.C.P. 12(b)(1) MUST BE**  
5 **DENIED BECAUSE PLAINTIFF HAS STANDING TO CHALLENGE THE**  
6 **STATUTES, THE REGULATION, AND THE OPEN LETTER.**

6 Plaintiff possesses standing under Article III because she has suffered an injury in fact  
7 that is fairly traceable to the Defendants' conduct and likely to be redressed by the relief  
8 requested in this case.<sup>1</sup> In order to satisfy the requirement of standing, "[a] plaintiff must allege  
9 personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be  
10 redressed by the requested relief." *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 127  
11 S.Ct. 2553 (2007), *quoting Allen v. Wright*, 468 U.S. 737, 751 (1984). The question of standing  
12 is "a factual one in which we view the facts pled in the light most favorable to Plaintiff." *Mirin v.*  
13 *Justices of Supreme Court of Nev.*, 415 F.Supp. 1178, 1195 (D. Nev. 1976), citing *Maryland*  
14 *Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512 (1941).  
15 Furthermore, the Supreme Court has instructed lower courts to take a broad view of  
16 constitutional standing in civil rights case, especially where private enforcement suits are the  
17 primary method of obtaining redress. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 93  
18 S.Ct. 364 (1972); *see Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9<sup>th</sup> Cir. 2008); *Chapman v.*  
19 *Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939 (9<sup>th</sup> Cir. 2011).

20 Here, the facts pled, when viewed in the light most favorable to the Plaintiff and in light  
21 of the broad view of standing dictated by the Supreme Court, demonstrate that Plaintiff clearly  
22 has standing under Article III. As discussed in further detail below, Plaintiff suffered an injury  
23 through the Defendants' implementation of the policy set forth in the Open Letter, which

24 \_\_\_\_\_  
25 <sup>1</sup> At the November 2, 2012 hearing, the Court asked the parties to brief whether Plaintiff has standing to challenge  
26 18 U.S.C. § 922(d)(3). In their Motion to Dismiss, Defendants admit that if Plaintiff has standing under § 922(g)(3),  
27 she also has standing under § 922(d)(3). DEF MOTION TO DISMISS, p. 11, n. 9, citing *Dearth v. Holder*, 641 F.3d 499,  
28 500-03 (D.C. Cir. 2011). For the reasons set forth in this section, Plaintiff has standing under § 922(g)(3) and thus  
also has standing to challenge § 922(d)(3). Defendants have also admitted that this case is ripe. DEF MOTION TO  
DISMISS, p. 11, n. 9. Plaintiff agrees with the Defendants assertion that there is no ripeness problem in this case  
regardless of any incomplete information on Form 4473 because Mr. Hauseur denied the Plaintiff's purchase of the  
firearm based on his knowledge that Plaintiff possessed a Registry Card and the explicit instruction in the Open  
Letter than he was prohibited from transferring a firearm to anyone he knew possessed a Registry Card.

1 conclusively and irrefutably labels Plaintiff as an unlawful user of a controlled substance and  
2 thereby prohibits Plaintiff from exercising her Second Amendment right to purchase and possess  
3 a handgun. In the same respect, Plaintiff also suffered injury to her First Amendment right to free  
4 speech and Fifth Amendment right to due process. These injuries are directly traceable to the  
5 Defendants' actions complained of in the FAC and can only be redressed by the granting of the  
6 relief requested by Plaintiff. Therefore, Defendants' Motion to Dismiss under Rule 12(b)(1) must  
7 be denied as Plaintiff has Article III standing.

8 **A. Plaintiff has Suffered, and is Continuing to Suffer, an "Injury in Fact."**

9 The first element of Article III standing is "an injury in fact (i.e. a 'concrete and  
10 particularized' invasion of a 'legally protected interest.'" *Sprint Commc'ns Co. v. APCC Servs.,*  
11 *Inc.* 554 U.S. 269, 273, 128 S.Ct. 2531, *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555,  
12 560-1, 112 S.Ct. 2130 (1992). The Supreme Court has recognized that in First Amendment  
13 challenges, "chilling effect [is] an adequate injury for establishing standing because the alleged  
14 danger . . . is, in large measure, one of self-censorship; a harm that can be realized even without  
15 actual prosecution." *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1129, *quoting*  
16 *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 108S.Ct. 636, 643 (1988)  
17 (internal quotations omitted); *see also Secretary of State v. Hoseph H. Munson Co.*, 467 U.S.  
18 947, 956, 104 S.Ct. 2839, 2847 (1984) ("when there is a danger of chilling free speech, the  
19 concern that constitutional adjudication be avoided whenever possible may be outweighed by  
20 society's interest in having the statutes challenged").

21 As a preliminary matter, Defendants' argument that Plaintiff is suffering no injury  
22 because her Registry Card expired is cut off by the fact that Plaintiff did renew her Registry Card  
23 and currently possesses an unexpired Registry Card. *See RENEWED REGISTRY CARD*,  
24 attached hereto as Exhibit "A" and incorporated herein by reference. The Registry Card attached  
25 to the FAC is the card Plaintiff possessed when she was initially denied her right to purchase a  
26 handgun, which was valid at the time of the attempted purchase and at the time of the filing of  
27  
28

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1 the Complaint.<sup>2</sup> Plaintiff has at all times relevant hereto possessed a valid and unexpired Registry  
2 Card and will continue to possess such a Card. The fact that the unexpired Registry Card was not  
3 attached to the FAC does not mean that the Plaintiff has failed to allege an injury in fact.

4 Even if Plaintiff's Registry Card had expired, she would still have sufficiently alleged an  
5 injury in fact. Where an issue is "capable of repetition, but evading review," standing exists even  
6 if the injury may be seen as not continuing at some point in the case. *Roe v. Wade*, 410 U.S. 113,  
7 125, 93 S.Ct. 705 (1973). In *Roe v. Wade*, a pregnant woman, Roe, challenged the  
8 constitutionality of Texas laws criminalizing abortion. *Id.* at 120. In both the district court and on  
9 appeal it was argued that Roe did not have standing because her pregnancy had naturally ended  
10 before the case was decided. On appeal, the Supreme Court upheld the district court's finding  
11 that Roe had standing because Roe could potentially become pregnant again; thus the same issue  
12 would be presented again but, because the normal human gestation period is so short, the  
13 pregnancy would again end before the appellate process could be completed. *Id.* at 124-25.

14 Here, even if Plaintiff had not maintained a valid Registry Card, the harm suffered by  
15 Plaintiff is capable of repetition but evading review. Under Nevada law, a Registry Card is only  
16 valid for a period of one year, which is a much shorter time period than what is typically required  
17 to litigate a case of this nature. N.R.S. 453A.220(4). Even if Plaintiff let her Registry Card  
18 expire, she would still have an injury in fact giving rise to standing because she could potentially  
19 obtain a new Registry Card in the future and again be denied the purchase of a firearm as a result  
20 of her possession of the Card. Under *Roe*, the mere possibility that the harm will continue but

21 <sup>2</sup> The card was valid until March 10, 2012. The purchase was attempted on October 4, 2011 and the Complaint was  
22 filed on October 18, 2011. While not applicable to the facts of the present case, Defendants argue that if an FFL  
23 used an expired registration card to deny the purchase of a firearm, "Plaintiff's injury would stem from the actions  
24 of the FFL, not the Government." However, the Defendants' Open Letter does not at any point inform the FFL that  
25 it may not use an expired registration card to deny the transfer of a handgun. In fact, the Open Letter actually states  
26 that "if you are aware that the potential transferee is in possession of a card authorizing the possession and use of  
27 marijuana under State law . . . the person is an unlawful user of a controlled substance . . . [and] you may not  
28 transfer firearms or ammunition to the person." A reasonable FFL would take the Open Letter to mean that it cannot  
transfer a firearm or ammunition to a person who possesses a Registry Card, regardless of whether the card has  
recently expired. This seems especially clear in light of the definition of "unlawful user" set forth in 27 CFR 478.11,  
which provides that the use giving rise to a determination that a person is a current unlawful user of a controlled  
substance "is not limited to . . . use . . . within a matter of days or weeks before, but rather . . . use [that] has occurred  
recently enough to indicate that the individual is actively engaged in such conduct . . . [and an] inference of current  
use may be drawn from evidence of a recent use or possession . . . or a pattern of use or possession that reasonably  
covers the present time." Thus, FFLs would understand the Open Letter and regulation to mean that they could not  
transfer a firearm or ammunition to someone who they were aware possessed a recently expired Registry Card.

1 evade review is sufficient to satisfy the “injury in fact” element of standing.

2 Plaintiff was and continues to be denied her right to purchase a firearm as a result of her  
3 possession of a Registry Card. Through the Open Letter, Defendants have deemed the possession  
4 of a Registry Card to be conclusive and irrefutable evidence that the holder is an “unlawful user”  
5 of marijuana and have directed all FFLs not to sell firearms to anyone possessing such a card.  
6 Plaintiff has been injured by the denial of her Second Amendment right to purchase and possess  
7 a handgun. Furthermore, Plaintiff has experienced a chilling effect on her free speech as a result  
8 of the Defendants’ actions. Specifically, Plaintiff’s possession of the Registry Card is a form of  
9 protected speech, the exercise of which has led to the denial of her Second Amendment rights.  
10 The harm suffered by Plaintiff is a concrete and particularized invasion of a legally protected  
11 interest as Defendants deprived Plaintiff of her constitutional rights based solely on the fact that  
12 she possesses a Registry Card. Moreover, the harm suffered by Plaintiff is capable of repetition  
13 but evading review. As such, the Court should find that Plaintiff has alleged an injury in fact that  
14 will continue regardless of whether Plaintiff maintains her Registry Card.

15 **B. Plaintiff Meets the Traceability Element as Her Harm is Not “Self-Inflicted.”**

16 The second element of standing is that there be “a ‘fairly . . . traceable’ connection  
17 between the alleged injury in fact and the alleged conduct of the defendant.” *Sprint Commc’ns*  
18 *Co. v. APCC Servs., Inc.* 554 U.S. 269, 273, 128 S.Ct. 2531, *quoting Lujan v. Defenders of*  
19 *Wildlife*, 504 U.S. 555, 560-1, 112 S.Ct. 2130 (1992).

20 Here, a fairly traceable connection clearly exists between the Plaintiff’s alleged injury in  
21 fact and the alleged conduct of the Defendants. By issuing the Open Letter, Defendants deprived  
22 Plaintiff of her Second Amendment right to acquire a firearm and other related constitutional  
23 rights. Defendants argue that Plaintiff’s injury does not stem from their actions but rather from  
24 Plaintiff’s own decision making, i.e., Plaintiff’s decision to obtain a Registry Card in accordance  
25 with the rights provided by her State’s constitution and statutes. Defendant’s argument is  
26 analogous to arguing that a pregnant woman may not challenge laws restricting access to  
27 abortions because the woman’s own decision making is what caused her to become pregnant.  
28 Defendants’ allegation that Plaintiff can simply chose an option that causes her no harm by

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1 relinquishing her Registry Card fails in two respects: (1) it fails to address the harm that would  
2 then be caused to Plaintiff by the loss of her state law rights and (2) it fails to address the very  
3 real possibility that even if she relinquished her Registry Card, the Defendants' actions would  
4 still prevent Plaintiff from obtaining a firearm.<sup>3</sup>

5 Through their actions, Defendants are attempting to force Plaintiff to choose between her  
6 state law right to possess a Registry Card and her federal right to possess a firearm. However,  
7 there is no actual conflict between these rights as there is no federal law making it illegal to  
8 possess a Registry Card. The only conflict between the rights is the Defendants' unilateral  
9 determination, as set forth in the Open Letter, that the mere possession of a Registry Card  
10 constitutes conclusive and irrefutable evidence of unlawful drug use. Defendants completely  
11 foreclose the possibility that persons may possess a Registry Card and yet not use or possess  
12 marijuana, claiming that these persons would be "holding cards that serve them no purpose."  
13 DEF MOTION TO DISMISS at p. 13, lines 19-20. Defendants' opinion that no one would possess a  
14 Registry Card without also consistently invoking the corresponding right to possess and use  
15 marijuana is not based in reality and cannot be used as a grounds to deny the Plaintiff her  
16 Constitutional rights.

17 Furthermore, Defendants' argument that Plaintiff's injury is self-inflicted, and therefore  
18 not traceable to Defendants, is disingenuous. Initially, the "self-inflicted" harm standard set forth  
19 in Defendants' Motion is found almost exclusively in cases dealing with disputes between two  
20 states.<sup>4</sup> Defendants also rely on *United States v. Yancey*, 621 F.3d 681, 682 (7<sup>th</sup> Cir. 2010).  
21 However, *Yancey* is inapplicable because Yancey actually was in possession of marijuana and  
22 confessed that he had smoked marijuana daily for about 2 years.<sup>5</sup> In the present case, Plaintiff's  
23 harm is clearly and directly traceable to the Defendants' actions.

#### 24 **C. Plaintiff's Harm Will Be Redressed by the Relief Requested.**

25 The third element of standing is whether it is "'likely' and not 'merely speculative' that  
26

27 <sup>3</sup> As set forth in Note 2 above, it appears that if Plaintiff relinquished her Registry Card, she would still be denied  
28 her right to purchase and possess a handgun based on the definition of an "unlawful user" set forth in 27 C.F.R.  
478.11 and the policy set forth in the Open Letter.

<sup>4</sup> See e.g., *Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333.

<sup>5</sup> Moreover, *Yancey* did not even consider the issue of whether Yancey had standing to challenge 922(g)(3).

1 the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit." *Sprint*  
2 *Commc'ns Co. v. APCC Servs., Inc.* 554 U.S. 269, 273, 128 S.Ct. 2531, quoting *Lujan v.*  
3 *Defenders of Wildlife*, 504 U.S. 555, 560-1, 112 S.Ct. 2130 (1992). Defendants' assertion that  
4 Plaintiff does not satisfy the redressability element of standing is without merit. The  
5 redressability element only requires that it is 'likely' that the plaintiff's injury will be remedied  
6 by the relief plaintiff seeks in bringing suit. The remedy sought by Plaintiff in this matter is to  
7 declare 922(d)(3), 922(g)(3), 27 CFR 478.11, and the Open Letter unconstitutional as they  
8 violate the First Amendment, Second Amendment, and Fifth Amendment. If they are declared  
9 unconstitutional, Plaintiff will be able to purchase and possess a firearm.

10 Defendants argue that even if 922(d)(3), 922(g)(3), 27 CFR 478.11, and the Open Letter  
11 were all declared unconstitutional, Plaintiff still would be unable to purchase a handgun under  
12 Nevada law because they contend Plaintiff would still be an unlawful user of, or addicted to, a  
13 controlled substance. This argument is fundamentally flawed and, indeed, evidences the same  
14 flaw running through most of Defendants' arguments – that is, the unilateral, conclusive, and  
15 irrefutable determination that Plaintiff is an unlawful user of a controlled substance based solely  
16 on her possession of a card that gives her a right to possess and use marijuana if she chooses.  
17 There is no provision of Nevada law that deems Plaintiff an unlawful user of or addicted to a  
18 controlled substance based on her possession of a Registry Card. The Nevada laws only affect  
19 Plaintiff to the extent that they incorporate the federal laws challenged by Plaintiff in this suit. If  
20 the federal laws were removed, Nevada laws would not pose a barrier to Plaintiff obtaining and  
21 possessing a handgun.

## 22 **II. DEFENDANTS VIOLATED PLAINTIFF'S SECOND AMENDMENT** 23 **RIGHTS.**

### 24 **A. The ATF's Issuance of the Open Letter Violated the APA, Because it Made** 25 **Substantive Changes to the Law Without the Requisite Notice and** 26 **Comment Period.**

27 The ATF's Issuance of the Open Letter was an unlawful abuse of authority, given that the  
28 Letter made substantive changes to existing law and did so without the requisite period for notice  
and comment, as required under the Administrative Procedure Act (the "APA"). The APA

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1 requires agencies to advise the public through a notice in the Federal Register of the terms or  
2 substance of a proposed substantive rule, allowing the public a period to comment. *See* 5 U.S.C.  
3 § 553(b) and (c). This is termed the "notice and comment" requirement of the APA. "Th[e]  
4 requirement is designed to give interested persons, through written submissions and oral  
5 presentations, an opportunity to participate in the rulemaking process." *Chief Prob. Officers of*  
6 *California v. Shalala* ["*Probation Officers*"], 118 F.3d 1327, 1329 (9th Cir.1997). Generally,  
7 "[t]he procedural safeguards of the APA help ensure that government agencies are accountable  
8 and their decisions are reasoned." *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 758 (9th  
9 Cir.1992); *Erringer v. Thompson*, 371 F.3d 625 at 629-630. The only instances where agency  
10 rulings don't require notice and an opportunity for public comment are where such rulings are  
11 merely "interpretative rules, general statements of policy, or rules of agency organization,  
12 procedure, or practice." 5 U.S.C. § 553(b)(3)(A); *see also Erringer*, 371 F.3d 625 at 629.

13 In the present case, the Defendant seeks to justify the ATF's failure to follow the APA's  
14 Notice and Comment Requirement by asserting that the Open Letter was merely interpretive.  
15 However, the mere fact that an agency claims that its rule is interpretive does not by itself render  
16 the law interpretive. *Hemp Industries Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1088  
17 (9th Cir., 2003). Not surprisingly, the Defendants fail to apply the appropriate legal standard in  
18 determining whether the Open Letter was interpretive. If the Defendants had applied the proper  
19 standard, as set forth in the Ninth Circuit case *Hemp Industries*, the Defendants would have had  
20 no choice but to acknowledge that the Open Letter was, indeed, a substantive agency ruling,  
21 clearly subject to the Notice and Comment Requirement.

22 In *Hemp Industries*, the Ninth Circuit adopted the framework previously set down by the  
23 DC Circuit, noting that an agency ruling is "legislative," as opposed to "interpretive" whenever  
24 the rule is delivered with the "force of law." *Id.* at 1087 (9th Cir., 2003); *quoting American*  
25 *Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C.Cir.1993);  
26 *see also Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99, 115 S.Ct. 1232 (1995). The  
27 Court then identified the following three circumstances in which a rule has the "force of law":

- 28 (1) when, in the absence of the rule, there would not be an adequate  
legislative basis for enforcement action;



- (2) when the agency has explicitly invoked its general legislative authority; or  
(3) when the rule effectively amends a prior legislative rule.

*Hemp Industries Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1087 (9th Cir., 2003);  
quoting *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106,  
1109 (D.C.Cir.1993).

Here, the Open Letter was issued with the force of law, because: (a) without the Open Letter, there is no legislative basis for enforcing a blanket ban on the sale of firearms to Registry Cardholders and (b) the Open Letter effectively amended ATF's prior regulation on this matter, codified at 27 CFR 478.11. Despite the Defendants' somewhat forced attempt to paint the Open Letter as "interpretive," the simple fact is this: were it not for the Open Letter, there would be no legal basis for holding FFLs criminally liable under Section 922(d)(3) for selling a firearm to a Registry Cardholder. Indeed, after an exhaustive search of federal cases dating back to the original passage of Section 922(d)(3), the Plaintiff was unable to find a single case anywhere in the United States where an FFL was charged, let alone convicted, of violating Section 922(d)(3) for selling a firearm to a Registry Cardholder. Such a criminal charge has never occurred because, neither the statute nor the corresponding regulation provide any basis for such a charge.

Section 922(d)(3) reads in relevant part:

- (d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—  
[...]  
(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

While the statute does point to a definition for the term "Controlled Substances," citing 21 U.S.C. 802, the statute fails to provide any definition for the term "unlawful user." Taken on its plain meaning, the logical definition of the term "unlawful user" would mean an individual convicted of unlawfully using a Controlled Substance (whether convicted of a felony or a misdemeanor). However, the ATF took a somewhat broader interpretation of the term, when it in enacted 27 CFR 478.11, in which the agency provided the following definition of "unlawful user or addicted to a Controlled Substance":

A person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance; and any person

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who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician [...].

27 CFR 478.11.

The foregoing regulation immediately contradicts the language of the Open Letter, since the Open Letter specifically prohibits the sale of firearms to Registry Cardholders, who would have by necessity consulted a licensed physician prior to obtaining a Registry Card. As already pointed out in this brief, the process of obtaining a Registry Card requires under State Law a recommendation from a licensed physician. Meanwhile, 27 CFR 478.11 specifically defines “unlawful user” as a person who failed to obtain a prescription from a physician. This plain reading of the regulation would provide a simple and decisive defense for any firearms licensee wrongfully charged with a violation of Section 922(d)(3). However, the Open Letter changes the rule, providing the force of law necessary to charge and even convict any FFL that sells a firearm to a Registry Cardholder.

While this obvious distinction between the regulation and the Open Letter is sufficient grounds for triggering the Notice and Comment Requirements of the APA, a further reading of the entire regulation 27 CFR 478.11 gives us even more cause for concern. 27 CFR 478.11 includes a further explanation of the term “unlawful use,” along with a list of illustrative examples, none of which would come close to justifying a blanket ban on the sale of firearms to Registry Cardholders. 27 CFR 478.11 further states:

[Unlawful use] is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year. For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, nonjudicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.

27 CFR 478.11

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1 Nothing within the foregoing regulation states or even suggests that a Registry  
2 Cardholder would be automatically and irrefutably deemed an “unlawful user” and therefore  
3 denied her Second Amendment Rights. All of the examples provided above presume some level  
4 of fact-finding due process carried out to determine whether the person is, in fact, an unlawful  
5 user: “a conviction for use or possession [...]; multiple arrests within the past 5 years [...]; a  
6 drug test [...]; court-martial conviction.” *Id.* Each and every one of these bases for an  
7 “inference” requires some level of investigation or due process. However, the Open Letter  
8 simply makes the blanket assertion that any person with a Registry Card is *per se* a criminal and  
9 therefore shall be automatically deprived of her constitutionally guaranteed rights, without any  
10 notice, without any hearing, and without any due process.

11 The Open Letter represents a substantive change in the law, amending a prior regulation  
12 and creating criminal liability for FFLs where such liability did not previously exist. Yet, the  
13 Defendant failed to provide any opportunity for the public to review and comment upon this  
14 proposed rule, as required under the APA. Accordingly, the Open Letter is an unlawful abuse of  
15 the ATF’s authority and must be declared invalid.

16 **B. If the ATF’s Letter was Merely Interpreting Existing Law, Then the**  
17 **Underlying Law Violates the Second Amendment.**

18 A quote from the DC Circuit seems especially relevant to this case:

19 The phenomenon we see in this case is familiar. Congress passes a broadly  
20 worded statute. The agency follows with regulations containing broad  
21 language, open-ended phrases, ambiguous standards and the like. Then as  
22 years pass, the agency issues circulars or guidance or memoranda,  
23 explaining, interpreting, defining and often expanding the commands in  
24 the regulations.

25 *Appalachian Power Co v. Envtl. Protection Agency*, 208 F.3d 1015, 1020 (D.C. Cir., 2000).

26 Here, we have an instance where a federal agency has so broadly interpreted a federal  
27 statute as to render that statute unconstitutional. If this Court were to accept the extraordinary  
28 breadth with which the ATF has interpreted § 922(d)(3), and by implication § 922(g)(3), then  
between 10% and 50% of adult-aged US citizens would be precluded from possessing,

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1 purchasing, transporting or even receiving any firearm or ammunition.<sup>6</sup> In effect, the law, if  
2 enforced to the extent argued by the ATF, could deprive half of our adult-aged citizens of their  
3 fundamental constitutional right to keep and bear arms. Moreover, the ATF's interpretation of  
4 these statutes, as espoused in the Open Letter, seeks to create a means of automatically labeling  
5 entire groups of people with medical conditions as criminals, without any notice, without any  
6 hearing, and without any means of refuting or overturning what is, in effect, a criminal  
7 punishment.

8 **1. The ATF's Overbroad Interpretation of §§ 922(d)(3) and (g)(3)**  
9 **Unconstitutionally Violates Second Amendment Rights, failing under**  
10 **both a strict scrutiny and an intermediate scrutiny analysis.**

11 18 U.S.C § 922(d)(3) reads as follows:

12 (d) It shall be unlawful for any person to sell or otherwise dispose of any  
13 firearm or ammunition to any person knowing or having reasonable cause  
14 to believe that such person—  
15 [...]  
16 (3) is an unlawful user of or addicted to any controlled substance (as  
17 defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))

18 Meanwhile, 21 U.S.C § 802(6), the law defining “controlled substances,” reads as follows:

19 The term “controlled substance” means a drug or other substance, or  
20 immediate precursor, included in schedule I, II, III, IV, or V of part B of  
21 this subchapter. The term does not include distilled spirits, wine, malt  
22 beverages, or tobacco, as those terms are defined or used in subtitle E of  
23 the Internal Revenue Code of 1986.

24 If § 922(d)(3) were narrowly construed, such that the definition of an “unlawful user”  
25 encompassed only persons recently convicted of drug-related crimes (both misdemeanors and  
26 felonies), then the statute would satisfy constitutional standards. Similarly § 922(g)(3), which  
27 imposes criminal liability upon “unlawful users” who acquire or possess firearms, is  
28 constitutionally sound, if we assume that the determination of whether a person is an “unlawful

<sup>6</sup> According to data from the Substance Abuse and Mental Health Services Administration, dated 2011, out of a random sample of 58,397 people surveyed, 11.5% admitted to smoking marijuana within the last 12 months and an additional 30.4% admitted to smoking marijuana at some point preceding the last 12 months; as a representative statistic of the entire United States, this indicates that approximately 29.6 million people within the United States have used marijuana within the last year, while an additional 78.3 million people have smoked marijuana within their lifetimes ([http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=34481&ds=1&file\\_id=1098647](http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=34481&ds=1&file_id=1098647)); see also 2010 UNITED STATES HEALTH REPORT, as compiled by the National Center for Health Statistics, available at <http://www.cdc.gov/nchs/data/hus/hus10.pdf> (reporting that nearly half of all persons within the United States have taken prescription drugs within the last 30 days).

1 user” requires some level of judicial review (i.e., the criminal charges and proceedings filed  
2 against the accused party).

3       However, the ATF has deliberately sought to broaden the definition of “unlawful user” to  
4 include, not only persons with prior drug-related criminal convictions, but also any person that  
5 an FFL may by inference think is an “unlawful user.” As already noted, under 27 C.F.R. §  
6 478.11, the ATF broadly defines the term “[u]nlawful user of or addicted to any controlled  
7 substance.” *See full definition at p. 12, infra.* Then, in the Open Letter, the ATF further expanded  
8 the meaning of “unlawful user” to include any person with a Registry Card, dictating to all FFLs  
9 “if you are aware that the potential transferee is in possession of a card authorizing the  
10 possession and use of marijuana, then you have ‘reasonable cause to believe’ that the person is  
11 an unlawful user of a controlled substance. As such, you may not transfer firearms or  
12 ammunition to the person.”

13       The definition of “unlawful user” is disturbingly over-broad, attempting to circumvent all  
14 judicial review of alleged “unlawful” activity and merely labeling large groups of people as  
15 automatically and irrefutably engaged in criminal conduct, so as to deprive those individuals of  
16 their Second Amendment rights and do so without providing any notice, hearing or other  
17 procedural due process. This is a constitutionally untenable position, which is especially  
18 concerning, given the political underpinnings of the Government’s action.<sup>7</sup> This overbroad  
19 “interpretation” of §§ 922(d)(3) and (g)(3) is simply far too overreaching to pass constitutional  
20 muster, regardless of the level of scrutiny applied by this Court.

21                   **a. The Applicable Standard of Scrutiny for Second Amendment Cases**  
22                   **is Unclear and Unsettled.**

23       As noted by the Defendant, neither the US Supreme Court nor the Ninth Circuit has  
24 adopted a specific standard of scrutiny for Second Amendment cases. DEF MOTION TO DISMISS at  
25 pp. 36-37. While other Circuits have addressed this issue, the Defendants offer only a cursory  
26 analysis of those court opinions and makes the broad assertion that all circuits have uniformly

27 \_\_\_\_\_  
28 <sup>7</sup> As referenced in the introduction and addressed in more detail in Section III below, it is the Plaintiff’s position that the Open Letter was issued as a means of suppressing a growing pro-cannabis political movement and not actually aimed at the same policy issues that gave rise to the legislative enactment of §§ 922(d)(3) and (g)(3).

1 decided that Intermediate Scrutiny applies. *Id.* p. at 37, lines 11-12. While some circuits have  
2 openly adopted an intermediate scrutiny standard, most circuits have elected a more nuanced,  
3 case-by-case approach. *See e.g., United States v. Yancey*, 621 F.3d 681, 683 (7th Cir., 2010)  
4 (court applied intermediate scrutiny to the case at hand, but expressly stated that a different level  
5 of scrutiny may be applicable to other Second Amendment cases); *see also United States v.*  
6 *Marzzarella*, 614 F.3d 85, 97 (3rd Cir., 2010) (court noted that Second Amendment cases should  
7 be treated similarly to first amendment cases, in that, different levels of scrutiny may apply  
8 depending upon the threat posed to the right); *see also United States v. Carter*, 669 F.3d 411 (4th  
9 Cir., 2012) (referencing the same standard enunciated by the Seventh Circuit, suggesting that  
10 different levels of scrutiny shall apply, depending upon the extent to which the Second  
11 Amendment right is curtailed under the law).<sup>8</sup>

12 Moreover, the wholesale adoption of an intermediate scrutiny standard for all Second  
13 Amendment cases is deeply problematic given that the Supreme Court has made clear that the  
14 Second Amendment is a “fundamental” personal right. *District of Columbia v. Heller*, 554 US  
15 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) <sup>9</sup>; *see also McDonald v. City of Chicago*, 130  
16 S.Ct. 3020, 3042 (2010) (“It is clear that the Framers and ratifiers of the Fourteenth Amendment  
17 counted the right to keep and bear arms among those fundamental rights necessary to our system  
18 of ordered liberty”). If the Second Amendment is a “fundamental” right, as posited by the  
19 Supreme Court, then our nation’s case law directs that the Strict Scrutiny standard is the  
20 appropriate standard for analyzing laws aimed at stripping individuals of these rights. *See e.g.,*  
21 *Graham v. Richardson Sailer v. Leger*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Roe*  
22 *v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Planned Parenthood of*  
23 *Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992);  
24 *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988); *United States v. Virginia*,

25  
26 <sup>8</sup> It should also be noted that, while there is a debate as to whether strict or intermediate scrutiny applies to Second  
27 Amendment cases, the Supreme Court did rule out the rational basis standard of scrutiny. *DC v. Heller*, 554 US 570,  
28 n. 27, 628, 128 S. Ct. 2783, n. 27, 2783 (2008); *see also US v. Carter*, 669 F.3d 411, 415 (4th Cir., 2012)  
(acknowledging the Supreme Court’s foreclosure of rational basis scrutiny in Second Amendment cases).

<sup>9</sup> Specifically, the Court stated that “By the time of the founding [of the United States], the right to have arms had  
become fundamental for English subjects” then states that the Second Amendment was “a codified right ‘inherited  
from our English ancestors.’” 128 S. Ct. 2783 (*quoting Robertson v. Baldwin*, 165 U. S. 275, 281 (1897)).

1 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (J. Scalia *dissenting* notes that "strict  
2 scrutiny will be applied to the deprivation of whatever sort of right we consider 'fundamental'").  
3 "Even though the governmental purpose [may] be legitimate and substantial, that purpose cannot  
4 be pursued by means that broadly stifle fundamental personal liberties when the end can be more  
5 narrowly achieved." *Shelton v. Tucker Carr v. Young*, 364 U.S. 479, 488, 81 S.Ct. 247, 5  
6 L.Ed.2d 231 (1960). "Where legislative abridgment of 'fundamental personal rights and liberties'  
7 is asserted, 'the courts should be astute to examine the effect of the challenged legislation.'" *Id.*  
8 (*quoting Schneider v. State*, 308 U.S. 147, 161, 60 S.Ct. 146, 151 (1939)).

9 Nevertheless, regardless of which standard this Court ultimately decides to employ, §§  
10 922(d)(3) and (g)(3), as interpreted and promulgated by the ATF, fail to pass constitutional  
11 muster under any applicable standard. As explained in more detail below, the ATFs overbroad  
12 construction of §§ 922(d)(3) and (g)(3) is impossibly expansive, to the point that it utterly fails to  
13 comport with constitutional standards.

14 **b. The ATF's Interpretation of §§ 922(d)(3) and (g)(3) Fails Under a**  
15 **Strict Scrutiny Analysis because it is Not Narrowly Tailored to**  
16 **Satisfy a Compelling Government Interest and the Government has**  
**Far Less Restrictive Means of Achieving its Goals.**

17 18 U.S.C §§ 922(d)(3) and (g)(3), as interpreted by the Defendants, plainly fail to survive  
18 a strict scrutiny analysis. To survive a strict scrutiny analysis, the law must: (1) further a  
19 compelling government interest; (2) be narrowly tailored to achieve that compelling government  
20 interest; and (3) be the least restrictive means for achieving that compelling government interest.  
21 *See e.g. Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Kramer v. Union Free*  
22 *School District*, 395 U. S. 621, 395 U. S. 627 (1969); *Griswold v. Connecticut*, 381 U.S. at 381  
23 U. S. 485 (1965).

24 The ATF's broad interpretation of the term "unlawful user," as embodied in 27 C.F.R. §  
25 478.11, causes §§ 922(d)(3) and (g)(3) to fail on prongs two and three of the above-cited test: the  
26 law is not narrowly tailored to achieve the intended government interest, nor is it the least  
27 restrictive means of achieving the intended government interest. As noted by the Defendants, in  
28 their most recent Motion, §§ 922(d)(3) and (g)(3) were enacted with the intent of keeping  
firearms "out of the hands of presumptively risky people." DEF MOTION TO DISMISS, p. 3, lines

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1 27-28 (*quoting Dickerson v. New Banner, Inc.*, 460 U.S. 103, 112, n. 6 (1983)). However, in its  
2 attempt to deter firearm possession amongst these presumptively risky people, the ATF takes a  
3 scorched earth approach, seeking to deprive Second Amendment rights to a phenomenally large  
4 contingent of the American population – any and all persons that *may* have a physical addiction  
5 to any Controlled Substance and any all persons that *may* have taken a Controlled Substance  
6 without a physician’s prescription. Based on numbers from the Centers for Disease Control and  
7 the Substance Abuse and Mental Health Services Administration, this accounts for roughly  
8 rough fifty percent (50%) of all adults in the United States.<sup>10</sup>

9 18 U.S.C §§ 922(d)(3) and (g)(3), as interpreted by the ATF, are just too impossibly  
10 broad to survive strict scrutiny (or intermediate scrutiny for that matter). The law aims to  
11 deprive over one hundred million people of their constitutional right to keep and bear arms, just  
12 to target an infinitesimal subset of potentially dangerous individuals. Even if §§ 922(d)(3) and  
13 (g)(3) were solely concerned with illicit substance abuse (which they are not) and even if we  
14 were to assume that every single person who committed a violent crime within the last year was  
15 an illicit substance abuser (which is a quantum leap of an assumption), the violent persons  
16 targeted by §§ 922(d)(3) and (g)(3) would still only account for 3.2% of the total people actually  
17 affected by the law,<sup>11</sup> meaning that the law attacks the constitutional rights of more than thirty  
18 times the number of people that it is intended to affect. This is like leveling the entire rainforest  
19 just to take down a single rotting tree.

20 What’s more, it is Plaintiff’s contention that the Open Letter fails to even satisfy the first  
21 prong of the strict scrutiny standard; the Plaintiff asserts that the Open Letter, unlike the  
22 underlying statute, was not issued to further a compelling government interest, but rather was  
23 issued as a means of putting down a growing grassroots political movement. The Open Letter  
24 was part of an effort within the federal government to undermine the increasing groundswell of

25 <sup>10</sup> *Supra* at note 5.

26 <sup>11</sup> This statistic is based on a combination of two statistical sources. First, the Substance Abuse and Mental Health  
27 Services Administration calculates that 38,806,000 Americans had taken illicit drugs in 2010. Second, statistics  
28 compiled by the Federal Bureau of Investigation estimate that in that same year there were approximately 1,240,000  
instances of violent crime. See *Crime in the United States*, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/violent-crime>. Taken together, if we assume that each instance  
of violent crime was committed by a separate and distinct individual, and that each and every violent assailant was  
an illicit drug user, then only 3.2% of illicit drug users account for all violent crimes committed in the United States.



1 state-level support for the legalization of medical marijuana. The Open Letter was a  
2 straightforward abuse of agency authority, aimed at undermining the constitutional rights of our  
3 citizens. The Open Letter must be struck down as unconstitutional, together with the ATF's  
4 unconstitutionally broad interpretation of §§ 922(d)(3) and (g)(3)

5 **c. Even Under an Intermediate Scrutiny Analysis, 18 U.S.C. §§**  
6 **922(d)(3) and (g)(3) is Unconstitutional Because the Expansive**  
7 **Scope of the Law, Covering More than Half of the U.S. Population,**  
8 **is Not Substantially Related to Any Important Government Interest.**

9 To overcome intermediate scrutiny, the asserted governmental interest must be  
10 "substantial," rather than "compelling," and the regulation adopted must have "a direct,  
11 substantial relationship between the objective and the means chosen to accomplish the  
12 objective." *Coral Const. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *see also Association*  
13 *of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 729 (9th Cir. 1994) (*citing Central Hudson*  
14 *Gas v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341  
15 (1980); *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 540, 100 S.Ct.  
16 2326, 2334-35, 65 L.Ed.2d 319 (1980). As noted by the Ninth Circuit, "[i]ntermediate scrutiny's  
17 precise contours vary slightly depending upon which constitutional right is at issue." *Jacobs v.*  
18 *Clark County School Dist.*, 526 F.3d 419, n. 23 (9th Cir. 2008). Neither the Ninth Circuit, nor  
19 the Supreme Court has set down a system of intermediate scrutiny as applied to Second  
20 Amendment issues.

21 While the Plaintiff agrees that §§ 922(d)(3) and (g)(3) were enacted to further a  
22 "substantial" government interest, the Plaintiff contends that the Open Letter was not enacted for  
23 such a purpose. As previously noted in this brief, it is the Plaintiff's contention that the Open  
24 Letter was specifically authorized and issued for the purposes of suppressing a growing political  
25 movement. The DOJ, and by extension the ATF, endeavored to quash the medical cannabis  
26 movement by manipulating the enforcement of existing law to curtail the constitutional rights of  
27 individuals involved in the movement. This is a material factual allegation that precludes any  
28 summary judgment on this matter.

Moreover, due to the extraordinary breadth and scope with which the ATF has interpreted  
§§ 922(d)(3) and (g)(3), even prior to the issuance of the Open Letter, the law fails to provide a

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1 direct, substantial relationship between the law's objective and the means chosen to accomplish  
2 that objective. As previously noted, the ATF has taken a scorched earth approach in its  
3 interpretation of these laws, seeking to stretch §§ 922(d)(3) and (g)(3) beyond the boundaries of  
4 constitutionality and deprive Second Amendment rights to as many people as possible. The  
5 overwhelming impact of the law, as interpreted by the ATF, falls on the shoulders of non-violent,  
6 harmless individuals, depriving those individuals of their Second Amendment rights. The law  
7 does not merely apply to thieving, violent scoundrels. As applied by the ATF, §§ 922(d)(3) and  
8 (g)(3) prohibits the sick, the elderly,<sup>12</sup> and tens of millions others.

9 Meanwhile, the law allows a specific exception for alcohol abuse. Curiously, alcoholism,  
10 a condition that is widely known to increase aggression and violent tendencies<sup>13</sup> is exempted  
11 from prosecution under § 922(d)(3). If the law were truly constructed for the purpose of  
12 curtailing the ownership of firearms amongst potentially violent people, then why would it apply  
13 to all suspected drug users, but specifically exclude alcoholics? In a 1997 report from the  
14 National Institute of Health, it was noted that, as a direct effect of the consumption of alcohol,  
15 "[a]lcohol may encourage aggression or violence by disrupting normal brain function."<sup>14</sup>  
16 Nevertheless, § 922(d)(3), a law allegedly designed to keep firearms out of the hands of  
17 potentially dangerous people makes no attempt to keep guns from alcoholics.

18 Inversely, there is no viable evidence to suggest that marijuana use is correlated with  
19 violent crime (or any other crime beyond illegal drug use). While the Government makes a  
20 feeble attempt to tie drug use to criminal behavior, the statistics that the Government points to  
21 fail to take into account the large number of non-criminal drug users. The statistics cited by the  
22 Government merely analyze the number of prison inmates who admit to having been on narcotic  
23 substances at the time of arrest. However, those individuals account for a miniscule fraction of  
24 the total number of drug users in the United States.

25 At the end of 2010, state and federal prison populations totaled 1,518,104. Correctional

26 \_\_\_\_\_  
27 <sup>12</sup> See *supra* note 5 (90.1% of persons over the age of 65 report having taken prescription medications within the last  
thirty days).

28 <sup>13</sup> See NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM NO. 38 OCTOBER 1997, available at  
<http://pubs.niaaa.nih.gov/publications/aa38.htm>

<sup>14</sup> *Id.*

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1 Population in the United States, 2011. Bureau of Justice Statistics. This figure equals  
2 approximately 0.5% of the U.S. population. *Id.*; 2010 Census. Federal prisons housed 206,968  
3 prisoners while state prisons housed 1,311,136. The 2004 DOJ study relied upon by Defendants  
4 indicates that 32% of state prisoners and 26% of federal prisoners committed their current  
5 offense while under the influence of drugs.<sup>15</sup> However, only 15% of state prisoners and 14% of  
6 federal prisoners used marijuana at the time of their offense.<sup>16</sup> Thus, approximately 196,670 state  
7 inmates and 28,975 federal inmates committed their crimes while using marijuana. This equates  
8 to approximately 0.07% of the U.S. population having committed a crime while under the  
9 influence of marijuana. When this number is compared with the total number of Americans who  
10 report using marijuana, it is clear that marijuana use has no causal link to crime. Approximately  
11 106,232,000 Americans (or 34.4% of the total U.S. population) report having using marijuana in  
12 their lifetime.<sup>17</sup> Approximately 17,373,000 Americans (or 5.6% of the total U.S. population)  
13 report having used marijuana in the past month. Thus, the number of incarcerated persons who  
14 were using marijuana at the time of their crime equals only 0.2% of all persons who have used  
15 marijuana and 1.2% of all persons who are habitual users of marijuana.

16 Additionally, the 2004 DOJ study reports that violent offenders were less likely than  
17 other offenders to have used drugs in the month prior to their offense.<sup>18</sup> The report states  
18 “Violent offenders in State prison (50%) were less likely than drug (72%) and property (64%)  
19 offenders to have used drugs in the month prior to their offense.”

20 The Defendants also rely on a 2010 report by the Office of National Drug Control Policy.  
21 However, this report is not a good indicator of any supposed link between marijuana and crime  
22 because it only reports incidents of marijuana use in males arrested in 10 cities. Additionally, the  
23 ONDCP is not an independent research organization but rather a cabinet level component of the  
24 Executive Office with the stated objective of eradicating drug use. As such, any studies  
25 conducted by the ONDCP are inherently biased.

26 There is no viable link between the use of cannabis and violent behavior; meanwhile,

27 <sup>15</sup> See <http://bjs.ojp.usdoj.gov/content/DCF/duc.cfm>.

28 <sup>16</sup> *Id.*

<sup>17</sup> See [http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=32722&ds=1&file\\_id=1094507](http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=32722&ds=1&file_id=1094507)

<sup>18</sup> See <http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsfp04.pdf>.

1 there is clear and well-established evidence that alcohol is directly linked with violent behavior.  
2 Nevertheless, the ATF's application of §§ 922(d)(3) and (g)(3) arbitrarily preclude users of  
3 cannabis (or any other controlled substance for that matter) from exercising their fundamental  
4 constitutional rights. Sections 922(d)(3) and (g)(3), as interpreted by the ATF, fails to provide a  
5 direct, substantial relationship between the law's objective and the means chosen to accomplish  
6 the objective. The ATF's interpretation of this law is untenable, unenforceable, unconstitutional  
7 and utterly unrealistic; it must be declared unconstitutional.

8 **d. United State v Dugan does not foreclose a constitutional challenge to**  
9 **18 U.S.C §§ 922(d)(3) and (g)(3).**

10 In seeking to validate the constitutionality of §§ 922(d)(3) and (g)(3), the Defendants rely  
11 heavily, almost exclusively, upon the Ninth Circuit case *United States v. Dugan*, 657 F.3d 998  
12 (9th Cir 2011). However, *Dugan* is a deeply flawed opinion, lacking any meaningful legal  
13 analysis, and is not, in fact, applicable to the current case. Indeed, the Defendant's discussion of  
14 *Dugan* is longer than the actual court opinion.

15 Consisting of just four short paragraphs, *Dugan* makes the sweeping assertion that §  
16 922(g)(3) is constitutional, without even bothering to examine the law under a strict scrutiny,  
17 intermediate scrutiny or even rational basis analysis. Indeed, *Dugan* provides no substantive  
18 analysis of the law's constitutionality and appears to base its entire decision upon two similarly  
19 brief and similarly flawed opinions from sister circuit courts.<sup>19</sup>

20 Meanwhile, the facts of *Dugan* are so prejudicial that they fail to provide a proper  
21 framework for analyzing the constitutionality of §§ 922(d)(3) or (g)(3). In *Dugan*, the party  
22 challenging the law's constitutionality, Kevin Dugan, was arrested during a domestic violence  
23 complaint, when officers discovered an illegal marijuana "operation" in Mr. Dugan's home. Mr.  
24 Dugan was the very sort of person that § 922(g)(3) was designed for—a dangerous criminal.  
25 Based on the facts represented in the *Dugan* opinion, Kevin Dugan was possibly a wife beating,  
26 drug dealing, drug using, arms dealer. As the old saying goes: "Bad facts make bad law."

27 Indeed, §§ 922(d)(3) or (g)(3) don't merely affect the rights of the Kevin Dugans of this

28 <sup>19</sup> *Dugan* cites to only two cases in support of its proposition that 922(d)(3) is constitutional, *U.S v. Seay*, 620 F.3d 919 (8th Cir 2010), and *U.S. v Yancey*, 621 F.3d 681 (7th Cir 2010).

1 world; these laws, as interpreted by the ATF, threaten the fundamental constitutional rights of  
2 nearly half of the U.S. population.<sup>20</sup> Even though §§ 922(d)(3) or (g)(3) are intended to keep  
3 guns out of the hands of a small subset of the population, the ATF has radically over-reached the  
4 limits of this goal and sought to unilaterally categorize enormous swaths of the population as  
5 criminals, without the need for any judge, any jury or any due process.

6 The *Dugan* opinion does not so much as reference the ATF, let alone address the  
7 expansive manner with which this agency has sought to enforce §§ 922(d)(3) or (g)(3). In fact,  
8 the *Dugan* opinion pre-dates the Open Letter, so it naturally fails to address the constitutionality  
9 of that letter. The *Dugan* opinion does not even address the constitutionality § 922(d)(3), but  
10 rather only addresses § 922(g)(3). Meanwhile, it is actually under § 922(d)(3) that the ATF  
11 seeks to deprive individuals of their Second Amendment rights.

12 For the foregoing reasons, the *Dugan* Opinion is a flawed, short-cited opinion that simply  
13 does not apply to the current case.

### 14 **III. DEFENDANTS VIOLATED PLAINTIFF’S FIRST AMENDMENT RIGHTS.**

15 The ATF’s Blanket prohibition on the sale of firearms to Registry Cardholders  
16 violates such cardholders’ First Amendment rights to free speech and expression. By  
17 automatically labeling the Plaintiff as a criminal (an “unlawful user”), based purely upon her  
18 choice to acquire and maintain a State-issued Registry Card, the Defendants have deliberately  
19 sought to curtail the Plaintiff’s right to free speech. The Plaintiff’s procurement and possession  
20 of her Registry Card is a form expressive conduct protected under the First Amendment. And  
21 yet, the Defendants have endeavored to deter the Plaintiff from exercising those First  
22 Amendment Rights. The Defendants have effectively given the Plaintiff a Hobson’s Choice  
23 between her First and Second Amendment Rights: *you can either exercise your right to free*  
24 *expression, or you can exercise your right to keep and bear arms, but you can’t have both.* This  
25 is an unacceptable and unconstitutional proposition.

26 “As a general matter, the First Amendment means that the government has no power to  
27 restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v.*

28 \_\_\_\_\_  
<sup>20</sup> *Supra* note 5.

1 *Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002). Nevertheless, in the present case, the ATF  
2 sought to do just that.

3 **A. The Plaintiff's Procurement and Possession of a Registry Card Constitutes a**  
4 **Form of Speech Protected Under the First Amendment.**

5 It is well settled that the free speech protections of the First Amendment cover more than  
6 mere verbal communication. *See, e.g., Jacobs v. Clark Cnty. School Dist.*, 373 F.Supp.2d 1162,  
7 1171 (D. Nev. 2005) ("we have long recognized that [the First Amendment's] protection does  
8 not end at the spoken or written word"). If an activity is "sufficiently imbued with elements of  
9 communication" it will "fall within the scope of the First and Fourteenth Amendments." *Spence*  
10 *v. Washington*, 418 U.S. 405, 409 (1974). In determining whether conduct falls within the ambit  
11 of the First Amendment, the Court should consider "the nature of [the] activity, combined with  
12 the factual context and environment in which it was undertaken." *Id.* at 410.

13 In *Spence v. Washington*, the Supreme Court held that an activity is protected by the First  
14 Amendment when "[a]n intent to convey a particularized message was present, and in the  
15 surrounding circumstances the likelihood was great that the message would be understood by  
16 those who viewed it." *Id.* at 410-11. Both prongs of the *Spence* test are fact intensive, and both  
17 are met in the present case.<sup>21</sup>

18 Here, the Plaintiff intended to convey a particularized message by possessing a Registry  
19 Card and her message was understood by those who viewed it. The message was: *I am a*  
20 *proponent for the medical use of marijuana*. The Defendant wrongly tries to portray the Registry  
21 Card as a purely utilitarian instrument, merely a reflection of the Plaintiff's medical condition.  
22 However, the card is a powerful statement of how the Plaintiff wishes to treat her medical  
23 condition. The Card reflects the Plaintiff's deep seeded belief in the efficacy of medical  
24 marijuana, not just for her ailment, but also for a host of ailments. By undergoing the lengthy  
25 application process, the Plaintiff has made an affirmative expression of her belief that cannabis is  
26 a viable form of medicine.

27 The mere fact that the Card has a utilitarian purpose does not foreclose the prospect of the

28 <sup>21</sup> While the Plaintiff asserts that the facts inherent in one's possession of a Registry Card conclusively satisfy the  
Spence test for speech, the Plaintiff also points out that the fact specific nature

1 Card serving as a form of political speech. On the contrary, the underlying application process  
2 and purpose of the Card makes it, in fact, a more potent form of political speech. Obtaining a  
3 medical marijuana registry card in the State of Nevada is an exceedingly difficult and lengthy  
4 process.<sup>22</sup> Due in large part to the extreme divergent opinions on the efficacy of medical  
5 marijuana, the procedure for obtaining a Registry Card requires that the registrant undergo a  
6 series of application steps that take many months to complete. The Card is itself a badge of honor  
7 that, despite the many close-minded forces intent on taking away her right to possess the card,  
8 the Plaintiff endured and successfully navigated this needless bureaucracy.

9 The Plaintiff's intent to convey a particularized message is irrefutable at this stage of the  
10 litigation. Determining the Plaintiff's intent is a subjective inquiry. *See e.g., O.S.C & Assoc. v.*  
11 *Comm'r Of Internal Revenue*, 187 F.3d 1116, 1120 (9th Cir. 1999) (stating "intent is subjective,"  
12 *citing Elliotts, Inc. v. C.I.R.*, 716 F.2d 1241, 1243 (9th Cir. 1983). The Plaintiff avers that she  
13 intended, through her procurement of a Registry Card, and through her informing others that she  
14 possessed a Registry Card, to convey a message that marijuana is a valid medical treatment and  
15 that the use of medical marijuana for medical purposes should be legal.

16 Meanwhile, the use of marijuana for medical purposes is, and has been, at all times  
17 relevant hereto, a hotly debated political issue with tensions between the states and federal  
18 government growing stronger. In such circumstances, anyone who viewed Plaintiff's Registry  
19 Card or became aware that Plaintiff possessed the Registry Card, would understand the  
20 Plaintiff's intent to message her support for medical marijuana. Thus, Plaintiff's obtainment and  
21 possession of the Registry Card is a form of expressive activity protected by the First  
22 Amendment.

23 Moreover, even if Plaintiff's conduct could somehow be labeled as non-expressive  
24 activity, she still holds a valid First Amendment claim. "[W]here a statute based on a  
25 nonexpressive activity has the inevitable effect of singling out those engaged in expressive  
26 conduct, the statute may be subject to First Amendment scrutiny." *Roulette v. City of Seattle*, 97  
27 F.3d 300, 305 (9<sup>th</sup> Cir. 1996), *quoting Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986)

28 

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<sup>22</sup> FAC at Ex. 1, ¶¶ 21-24.

1 (internal quotations omitted). The Open Letter deliberately singles out all Registry Cardholders,  
2 a subset of the population that necessarily includes the most zealous and outspoken of medical  
3 marijuana advocates, those persons that the law most directly affects: medical marijuana patients.  
4 As such, the Open Letter inevitably singles out the medical marijuana lobby and seeks to  
5 suppress their outspoken criticism of the government by curtailing their Second Amendment  
6 Rights.

7 **A. The Constitutionality of the ATF's Enforcement Actions, as Applied to the First**  
8 **Amendment, Should be Examined Under a Strict Scrutiny Standard.**

9 Because the Plaintiff's activities in obtaining, possessing and informing others that she  
10 possess a Registry Card are protected by the First Amendment, any direct restraint on such  
11 activities must meet strict scrutiny. *Texas v. Johnson*, 491 U.S. 397, 406 (1989). "The purpose of  
12 the First Amendment is to protect private expression." *United States v. American Library Assn.,*  
13 *Inc.*, 539 U.S. 194, 211 (2003), *quoting Columbia Broadcasting System, Inc. v. Democratic*  
14 *National Committee*, 412 U. S. 94, 139 (1973). Strict scrutiny applies to regulations that are  
15 "related to the suppression of free expression." *Johnson*, 491 U.S. at 406.

16 While the Defendants have argued for the less stringent standard set forth in *United*  
17 *States v. O'Brien*, insisting that the Open Letter was not intended to inhibit speech, the Plaintiff  
18 contends that the Open Letter was indeed directly aimed at hindering speech. It is the Plaintiff's  
19 assertion that the DOJ, and by extension the ATF, enacted the Open Letter with the deliberate  
20 intent to suppress the growing medical marijuana movement. It is no coincidence that the Open  
21 Letter was issued by a bureau of the same agency that was, at the same time, in the process of  
22 coordinating a massive crackdown on medical marijuana growers and dispensaries in multiple  
23 states. It is no coincidence that the Open Letter was issued within days of an IRS' ruling that  
24 prohibited marijuana growers and dispensaries from writing off business expenses. It is no  
25 coincidence that the Open Letter was issued just a few weeks before the four US Attorneys of  
26 California dispatched a series of letters to California dispensaries, giving them 45 days to shut  
27 down or face criminal prosecution. The Open Letter was part of a coordinated effort to  
28 intimidate and suppress a political movement.

Given that the Open Letter was squarely aimed at curtailing individuals' freedom of

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1 speech and expression, a judicial review of the Letter's constitutionality is subject to a strict  
2 scrutiny analysis.

3 **B. The ATF's Enforcement Actions, as Set Forth in the Open Letter, Fail to Meet**  
4 **Strict Scrutiny Standards.**

5 In order for a law to survive judicial review under a strict scrutiny analysis, the law must  
6 be (1) justified by a compelling governmental interest; (2) narrowly tailored to achieve that goal  
7 or interest; and (3) the least restrictive means of achieving that interest. *R.A.V. v. City of St Paul,*  
8 *Minnesota*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

9 Here, the Open Letter fails on all three of the foregoing points. First, the letter was NOT  
10 issued to serve any compelling government interest, but rather was issued for the purpose of  
11 intimidating and suppressing a growing political movement. Second, even if this Court were to  
12 believe the Defendants' asserted purpose for the Open Letter, the Letter was not narrowly  
13 tailored to effectuate that purpose. Automatically classifying all Registry Cardholders as  
14 criminals effectively deprives an enormous cross section of the public of their Second  
15 Amendment rights without any real policy justification. Finally, there are a myriad of less  
16 restrictive methods of curtailing gun violence and preventing presumptively dangerous people  
17 from possessing firearms.

18 There is no constitutional justification for the Open Letter. The ATF's issuance of the  
19 Letter was an abusive of its authority, designed to chill the advocacy efforts of medical  
20 marijuana activists.

21 **C. Even Examined Under the Less Restrictive O'Brien Test, the ATF's Universal Ban**  
22 **on the Sale of Firearms to Registry Cardholders Amounts to an Unconstitutional**  
23 **Restriction on Free Speech.**

24 Even if this Court were to employ the *O'Brien* test, as argued for by the Defendants, the  
25 ATF's pronouncement that all Registry Cardholders are *per se* criminals, as set forth in the Open  
26 Letter, is still a clear violation of First Amendment rights. *O'Brien* requires that the regulation  
27 (1) be "within the constitutional power of the Government," (2) "further an important or  
28 substantial government interest," (3) "the government interest is unrelated to the suppression of  
free expression," and (4) the incidental restriction on First Amendment freedoms is no greater  
than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 367

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1 (1968)

2 In the present case, the ATF's interpretation of §§ 922(d)(3) and (g)(3), as set forth in the  
3 Open Letter, does not merely place an incidental restriction on First Amendment freedoms. On  
4 the contrary, the Open Letter completely precludes Registry Cardholder's from exercising their  
5 right to free speech, unless they are willing to relinquish their right to bear arms. As mentioned  
6 earlier, this is an unconstitutional Hobson's Choice, where the Registry Cardholders are forced to  
7 decide between Constitutional rights. The ATF's Open Letter was directly related to suppressing  
8 a political movement. It did not further any important or substantial government interest. It was  
9 merely an attack on the civil liberties of the medical marijuana lobby.

10 Meanwhile, The restriction placed on First Amendment freedoms was far greater than  
11 what was essential to the furtherance of Defendants' alleged purpose of keeping guns out of the  
12 hands of potentially dangerous people. While there is very little, if any, meaningful evidence to  
13 suggest that marijuana users are more violent than the rest of the community, there is most  
14 definitely no evidence to connect Registry Cardholders with gun violence. Examining the final  
15 prong of *O'Brien* test, it is plain to see that the ATF's interpretation of §§ 922(d)(3) and (g)(3)  
16 posed a far greater threat upon the First Amendment freedoms of Registry Cardholders than it  
17 furthered any gun control efforts.

18 Accordingly, even under the *O'Brien* test, which is less stringent than the strict scrutiny  
19 analysis required in this case, the Defendants' universal ban on the sale of firearms to Registry  
20 Cardholders is unconstitutional.

21 **IV. DEFENDANTS VIOLATED PLAINTIFF'S RIGHT TO SUBSTANTIVE DUE**  
22 **PROCESS.**

23 Plaintiff has asserted a substantive due process claim and such claim does not merge with  
24 Plaintiff's claims under the First and Second Amendments as argued by Defendants. In her  
25 Complaint, Plaintiff alleged one cause of action for violation of her 5<sup>th</sup> Amendment Due Process  
26 rights, which contained both a procedural and substantive aspect. As explained in Plaintiff's  
27 Response and Cross-Motion (Dkt. No. 17), Plaintiff possesses a liberty right in the ability to  
28 choose a course of medical treatment. In the FAC, Plaintiff split her Due Process claim into  
separate causes of action for the violations of procedural due process and the violations of

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1 substantive due process. In the FAC, Plaintiff sets forth under her substantive due process claim  
2 that Defendants have deprived her of her First and Second Amendment rights. However, such  
3 provisions in the FAC do not waive Plaintiff's previous assertion that she possess a liberty right  
4 in the ability to choose a course of medical treatment nor do they merge Plaintiff's substantive  
5 due process claim with her First and Second Amendment claims as Defendants allege.<sup>23</sup>

6 The Fifth Amendment of the United States Constitution provides, in relevant part that  
7 "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S.  
8 Const. Amend. V. The right to substantive due process concerns the right to liberty under the  
9 Fifth and Fourteenth Amendments. Essentially, the question of substantive due process asks  
10 whether a person is free to engage in certain conduct in the exercise of their liberty under the  
11 Due Process Clause. *See Lawrence v. Texas*, 539 U.S. 558, 564 (2003). The broad substantive  
12 reach of liberty under the Due Process Clause has been noted in a number of U.S. Supreme Court  
13 Cases. *Id.*; *see also Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262  
14 U.S. 390 (1923); and *Griswold v. Connecticut*, 381 U.S. 479 (1965). "[T]he full scope of the  
15 liberty guaranteed by the Due Process Clause . . . includes a freedom from all substantial  
16 arbitrary impositions and purposeless restraints." *Albright v. Oliver*, 510 U.S. 266, 287 (1994)  
17 (concurring opinion), *quoting Poe v. Ullman*, 367 U.S. 497, 543 (1961) (internal quotations  
18 omitted). The U.S. Supreme Court has found that:

19 "[Matters] involving the most intimate and personal choices a person may  
20 make in a lifetime, choices central to personal dignity and autonomy, are  
21 central to the liberty protected by the Fourteenth Amendment. At the heart  
22 of liberty is the right to define one's own concept of existence, of  
meaning, of the universe, and of the mystery of human life. Beliefs about  
these matters could not define the attributes of personhood were they  
formed under compulsion of the State."

23 *Lawrence*, 539 U.S. at 574, *quoting Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S.  
24 833 (1992). "[T]he ultimate question is whether sufficient justification exists for the intrusion by  
25 the government into the realm of a person's 'liberty, dignity, and freedom.'" *Compassion in*

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26  
27 <sup>23</sup> While Plaintiff maintains her claim that substantive due process protects her right to choose a course of medical  
28 treatment without interference from the Government, in the interests of brevity, this Response will not go into a  
detailed discussion of that right because it is not addressed in Defendants' Motion. However, Plaintiff maintains the  
right as it is set forth in her Response and Cross-Motion, Dkt. No. 17.

1 *Dying v. State of Washington*, 79 F.3d 790, 799 (9<sup>th</sup> Cir. 1996), *quoting Cruzan v. Director*,  
2 *Missouri Dept. of Health*, 497 U.S. 261, 287, 289, 110 S.Ct. 2841, 2856, 2857 (1990)  
3 (O'Connor, J., concurring).

4 The argument that Plaintiff's substantive due process claim fails because Plaintiff has  
5 alleged a deprivation of her First and Second Amendment rights is without merit. A plaintiff may  
6 allege both violations of the substantive due process clause and violations of another  
7 Constitutional Amendment without losing her substantive due process claim. While the Supreme  
8 Court has held that claims against law enforcement officers for use of excessive force must be  
9 brought under the Fourth Amendment rather than the substantive due process provision of the  
10 Fifth Amendment "[b]ecause the Fourth Amendment provides an explicit textual source of  
11 constitutional protection against this sort of physically intrusive governmental conduct," it does  
12 not follow that no substantive due process claim can ever been had where there is a  
13 corresponding violation of another Constitutional Amendment. Here, Plaintiff has alleged a  
14 substantive due process claim as a result of Defendants' actions and such claim is not foreclosed  
15 by the fact that Plaintiff also alleges violations of her First and Second Amendment rights.

16 **V. DEFENDANTS VIOLATED PLAINTIFF'S RIGHT TO PROCEDURAL DUE**  
17 **PROCESS.**

18 The United States Constitution requires that whenever a governmental body acts to injure  
19 an individual, that act must be consonant with due process of law. The minimum procedural  
20 requirements necessary to satisfy due process depend upon the circumstances and the interests of  
21 the parties involved. "In all cases, that kind of procedure is due process of law which is suitable  
22 and proper to the nature of the case, and sanctioned by the established customs and usages of the  
23 courts." *Ex Parte Wall*, 107 U.S. 265, 289 (1883).<sup>24</sup> With respect to action taken by

24 \_\_\_\_\_  
25 <sup>24</sup> Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Comm. V. McGrath*, 341 U.S. 123, 163  
(1951), further elaborated upon this understanding as follows:

26 "The precise nature of the interest that has been adversely affected, the manner in which  
27 this was done, the reasons for doing it, the available alternatives to the procedure that was  
28 followed, the protection implicit in the office of the functionary whose conduct is  
challenged, the balance of hurt complained of and good accomplished - these are some of  
the considerations that must enter into the judicial judgment."

1 administrative agencies, the Supreme Court has held that notice must be given and a hearing  
2 must be held before a final order becomes effective. *Opp Cotton Mills v. Administrator*, 312 U.S.  
3 126, 152, 153 (1941). “The fundamental requisite of due process of law is the opportunity to be  
4 heard.” *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). When the Constitution requires a hearing,  
5 the hearing must be “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*,  
6 380 U.S. 545, 552 (1965). Generally, these provisions require that the hearing be held before a  
7 tribunal which meets currently prevailing standards of impartiality and a party must be given an  
8 opportunity not only to present evidence, but also to know the claims of the opposing party and  
9 to meet them. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950); *see also Goldberg*, 397 U.S.  
10 at 267-268. Furthermore, those who are brought into contest with the government in a quasi-  
11 judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the  
12 government proposes and to be heard upon the proposal before the final command is issued.  
13 *Margan v. United States*, 304 U.S. 1, 18-19 (1938).

14         Here, the Defendants have deprived the Plaintiff of a fundamental right without any  
15 notice or opportunity to be heard. The Defendants have adopted and are enforcing a policy,  
16 through their Open Letter, whereby a distinct group of individuals are automatically precluded  
17 from exercising their fundamental rights under the U.S. Constitution based solely upon an FFLs  
18 reasonable belief that these persons are exercising their State granted rights. The Defendants  
19 have conclusively and irrefutably determined that the mere fact that an FFL is aware a “potential  
20 transferee is in possession of a card authorizing the possession and use of marijuana under State  
21 law, then [the FFL has] ‘reasonable cause to believe’ that the person is an unlawful user of a  
22 controlled substance” and must deny the transfer of firearms or ammunition to that person.

23         However, such a determination that holders of a Registry Card are automatically  
24 prohibited from obtaining a firearm deprives the Plaintiff of her Second Amendment rights  
25 without any due process. Prior to the issuance of the Open Letter, Plaintiff was not given any  
26 opportunity to comment on the policy set forth in the Open Letter. Additionally, Defendants have  
27 not even provided a post-termination procedure whereby persons who hold Registry Cards can  
28 argue that they are not “unlawful users of or addicted to” a controlled substance. While the exact

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1 number of medical marijuana users is uncertain, it is estimated that roughly 600,000 persons in  
2 the U.S. are using medical marijuana in the nine states where registration is mandatory. By virtue  
3 of their issuance and enforcement of the policy set forth in the Open Letter, the Defendants have  
4 willfully deprived a large class of U.S. citizens, including the Plaintiff, of their fundamental  
5 rights in direct violation of the procedural requirements of the Due Process Clause. Defendants  
6 cannot be allowed, simply on their conclusory opinion that Registry Cardholders are always drug  
7 users, to avoid the procedural due process requirements of the Fifth Amendment.

8 **VI. DEFENDANTS HAVE VIOLATED PLAINTIFF'S RIGHT TO EQUAL**  
9 **PROTECTION.**

10 The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within  
11 its jurisdiction the equal protection of the law." This provision of the Fourteenth Amendment has  
12 been held by the United States Supreme Court to apply to the federal government by virtue of the  
13 Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954). The Equal Protection  
14 Clause "is essentially a direction that all persons similarly situated be treated alike." *City of*  
15 *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause  
16 "keeps governmental decision makers from treating differently persons who are in all relevant  
17 aspects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *see also Honolulu Weekly, Inc. v.*  
18 *Harris*, 298 F.3d 1037, 1047 (9<sup>th</sup> Cir. 2002) ("The Equal Protection Clause directs that all  
19 persons similarly circumstanced shall be treated alike.")

20 Here, Defendants have violated Plaintiff's equal protection rights by treating  
21 Plaintiff differently from persons to whom she is similarly situated. The FAC alleges that  
22 Plaintiff is being treated differently than similarly situated individuals, which must be accepted  
23 as true for purposes of Defendants' Motion. Additionally, the determination of whether Plaintiff  
24 is being treated differently than similarly situated persons is inherently an issue of fact. Because  
25 there is a genuine dispute as to the material fact of whether Plaintiff is being treated differently  
26 than similarly situated persons, Defendants cannot be granted to Defendants on Plaintiff's Equal  
27 Protection claim.

28 In the FAC, Plaintiff specifically alleges that she is being treated differently from persons  
who are prescribed medical marijuana in states where obtainment of a Registry Card is not

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1 required because Defendants have conclusively and irrefutably deemed Plaintiff an “unlawful  
2 user” of marijuana based solely on her obtainment of a Registry Card as required by her state;  
3 Defendants have not issued any directive to FFLs that a person who gains access to medical  
4 marijuana in a state where a Registry Card is not required is an “unlawful user” of marijuana. In  
5 their Motion, Defendants completely misrepresent the allegations set forth in Plaintiff’s FAC and  
6 incorrectly assert that Plaintiff’s Equal Protection Claim rests on a supposed argument that  
7 “because some states allow medical marijuana use without issuing registry identification cards,  
8 those medical marijuana users will be able to buy firearms more easily than people who live in  
9 states that require medical marijuana registry cards.” Motion to Dismiss at p. 40, lines24-26.  
10 However, this argument does not appear anywhere in the FAC.

11 As additional grounds for her Equal Protection claim, Plaintiff’s FAC also alleges that  
12 Plaintiff is being treated differently from persons with similar medical conditions. Defendants  
13 have conclusively and irrefutably deemed Plaintiff an “unlawful user” of marijuana simply  
14 because she has followed state laws for the obtainment of treatment for her medical condition;  
15 the Defendants have not issued directives to FFLs deeming any person who pursues any method  
16 of treatment other than medical marijuana an “unlawful user” of a controlled substance.  
17 Defendants, without any basis, allege that it is “entirely reasonable for the government to infer  
18 that those individuals who have affirmatively registered to use marijuana on the basis of chronic  
19 medical conditions are, in fact, marijuana users.”<sup>25</sup> Motion to Dismiss at p. 41. Such conclusion  
20 is not “entirely reasonable” and completely ignores the reality that many people may register for  
21 a card and then not use or possess marijuana.<sup>26</sup>

22 The Defendants’ policy set forth in the Open Letter thus discriminates against persons

23 <sup>25</sup> Defendants’ assertion that those who “have affirmatively registered to use marijuana . . . are, in fact, marijuana  
24 users” actually raises an important question about when a person pursuing the right to use medical marijuana may be  
25 deemed an “unlawful user.” The Open Letter directs FFLs to deny firearm purchases based on a person’s possession  
26 of a Registry Card but Defendants assert that a person may be deemed an “unlawful user” from the time they  
27 “affirmatively register.” In Nevada, and many other states, there are typically many months between the time that a  
28 person registers and the time they receive their registration card. In the present case, it took seven (7) months from  
the time Plaintiff submitted her paperwork until she received her Registry Card. Would Defendants label her an  
“unlawful user” during those seven months?

<sup>26</sup> For example, many persons obtain Registry Cards prior to their condition becoming so debilitating that the person  
can no longer deal with the pain without the use of marijuana. The difficulty and length of time required to obtain a  
Registry Card in Nevada and other states actually encourages that persons prescribed medical marijuana take action  
to obtain their Registry Card as soon as possible, even if they may not use or possess marijuana in the near future.

1 who live in a state that requires a registry identification card because any knowledge of the  
2 person's possession of that card can be used as conclusive and irrefutable evidence to deny their  
3 attempt to purchase firearms and/or ammunition. Meanwhile, persons entitled to use medical  
4 marijuana in a state that does not issue registry identification cards will avoid the policies set  
5 forth in the Open Letter simply because their state does not issue registry identification cards. As  
6 such, the policies adopted and promulgated by the Defendants, as set forth in the Open Letter,  
7 violate the Plaintiff's right to equal protection.

8 **VII. PLAINTIFF DOES NOT SEEK MONETARY DAMAGES AGAINST THE**  
9 **UNITED STATES, OTHER THAN COSTS AND FEES ALLOWED, BUT**  
10 **INSTEAD SEEKS DECLARATORY AND INJUNCTIVE RELIEF.**

11 Plaintiff does not dispute that 5 U.S.C § 702 does not provide for monetary damages  
12 against the United States, the ATF or the individual Defendants in their official capacities. The  
13 primary purpose of this case is, and has always been, to obtain declaratory and injunctive relief  
14 against the Defendants. Plaintiff has already asserted that she is not seeking monetary relief in  
15 this action other than various fees and costs associated with pursuing this case as provided for in  
16 28 U.S.C. § 2412 and similar statutes. The Prayer for Relief contained in Plaintiff's FAC  
17 requesting "compensatory and punitive damages" should not be read as requesting a monetary  
18 award against Defendants other than a monetary award of costs and fees to which Plaintiff is  
19 entitled by statute. 5 U.S.C. § 702 provides that in "[a]n action in a court of the United States  
20 seeking relief other than monetary damages . . . [t]he United States may be named as a  
21 defendant." Here, the Plaintiff seeks both declaratory and injunctive relief, which is, relief other  
22 than monetary damages. Thus, the United States is a proper defendant in this action.

23 / / /

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28 / / /



1 **CONCLUSION**

2 Based upon the authorities set forth herein, Defendants are neither entitled to dismissal  
3 under F.R.C.P. 12(b)(1) and F.R.C.P. 12(b)(6), nor are they entitled to summary judgment on the  
4 causes of action set forth in Plaintiff's First Amended Complaint. Plaintiff therefore respectfully  
5 requests that Defendants' Motion be DENIED.

6 Dated this 25<sup>th</sup> day of February 2013.

7 Respectfully Submitted by:

8 RAINEY DEVINE, ATTORNEYS AT LAW

9 By: /s/ Chaz Rainey

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**PROOF OF SERVICE**

I, Jennifer J. Hurley, an employee of The Law Firm of Rainey Devine, certify that the following individuals were served with PLAINTIFF’S RESPONSE TO THE UNITED STATES’ MOTION TO DISMISS OR, IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, on this date by the below identified method of service:

**Electronic Case Filing**

TONY WEST  
DANIEL G. BOGDEN  
SANDRA SCHRAIBMAN  
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P.O. Box 7146, Ben Franklin Station  
Washington, DC 20044

DATED this 25th day of February 2012.

/s/ Jennifer J. Hurley  
An employee of The Law Firm of Rainey Devine.

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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

S. ROWAN WILSON, an individual, )  
)  
Plaintiff, )  
vs. )  
)  
ERIC HOLDER, individually and as Attorney )  
General of the United States; THE U.S. )  
BUREAU OF ALCOHOL, TOBACCO, )  
FIREARMS, AND EXPLOSIVES; B. TODD )  
JONES, individually and as Acting Director of )  
the U.S. Bureau of Alcohol, Tobacco, )  
Firearms, and Explosives; ARTHUR )  
HERBERT, individually and as Assistant )  
Director of the U.S. Bureau of Alcohol, )  
Tobacco, Firearms, and Explosives; and THE )  
UNITED STATES OF AMERICA, )  
)  
Defendants. )

Case No.: 2:11-cv-01679-GMN-PAL

**ORDER**

Pending before the Court is the Motion to Dismiss Plaintiff's First Amended Complaint (ECF No. 37) filed by the United States of America, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("BATFE"), U.S. Attorney General Eric Holder, Acting BATFE Director B. Todd Jones, and Assistant BATFE Director Arthur Herbert's (collectively, "Defendants"). Plaintiff S. Rowan Wilson ("Plaintiff") filed a Response (ECF No. 41) and Defendants filed a Reply (ECF No. 47).

**I. BACKGROUND**

This case arises from an asserted conflict between the right secured by the Second Amendment, certain provisions of the federal Gun Control Act that prohibit the users of controlled substances from procuring firearms, and the recent wave of state legislation legalizing the medical use of marijuana. In 2001, the Nevada legislature enacted legislation

1 exempting the medical use of marijuana from state criminal prosecution in certain limited  
2 circumstances. *See* Nev. Rev. Stat. § 453A. Specifically, the legislation permits individuals  
3 who obtain a state-issued registry identification card (“state marijuana registry card”) to use  
4 marijuana for medicinal purposes. Nev. Rev. Stat. § 453A.200(1)(f).

5       However, under the Controlled Substances Act, marijuana is listed as a controlled  
6 substance that cannot be lawfully prescribed and that the general public may not lawfully  
7 possess. 21 U.S.C. § 802(6); 21 U.S.C. § 812(c), Sched. I(c)(10). There is no provision under  
8 Federal law that permits any class of the general public to lawfully possess marijuana,  
9 including those wishing to use marijuana for medical purposes. *See* 21 U.S.C. § 823(f)  
10 (providing an exception to the ban on possession of Schedule I drugs for federally approved  
11 research projects); *see also Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (“By classifying  
12 marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the . . . possession  
13 of marijuana became a criminal offense, with the sole exception being use of the drug as part of  
14 a Food and Drug Administration pre-approved research study.”). In contrast, the Controlled  
15 Substances Act expressly recognizes that “there is a lack of accepted safety for use of  
16 [marijuana] under medical supervision.” 21 U.S.C. § 812(b)(1)(A)–(C). *See* 21 U.S.C. § 829;  
17 *see also United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491 (2001)  
18 (“Whereas some other drugs can be dispensed and prescribed for medical use, . . . the same is  
19 not true for marijuana.”).

20       Furthermore, the Federal Gun Control Act of 1968 (“Gun Control Act”) prohibits “any  
21 person . . . who is an unlawful user of or addicted to any controlled substance . . . [to] possess . .  
22 . any firearm or ammunition . . . .” 18 U.S.C. § 922(g)(3). Additionally, § 922(d)(3) prohibits  
23 any person from selling or otherwise disposing of “any firearm or ammunition to any person  
24 knowing or having reasonable cause to believe that such person . . . is an unlawful user of or  
25 addicted to any controlled substance . . . .” 18 U.S.C. § 922(d)(3).

1 In September 2011, because of the growing number of states that permit the medicinal  
2 use of marijuana, the ATF issued an “Open Letter.” Bureau of Alcohol, Tobacco, Firearms and  
3 Explosives, Open Letter, *Open Letter to All Federal Firearms Licensees – The use of*  
4 *marijuana for medical purpose and its applicability to Federal firearms laws* (Sept. 26, 2011),  
5 *available at* [http://www.atf.gov/press/releases/2011/09/092611-atf-open-letter-to-all-ffls-](http://www.atf.gov/press/releases/2011/09/092611-atf-open-letter-to-all-ffls-marijuana-for-medicinal-purposes.pdf)  
6 [marijuana-for-medicinal-purposes.pdf](http://www.atf.gov/press/releases/2011/09/092611-atf-open-letter-to-all-ffls-marijuana-for-medicinal-purposes.pdf) [hereinafter “*ATF Open Letter*”]. Notably, this letter  
7 informed all individuals licensed to sell firearms (“Federal Firearms Licensees” or “FFLs”) that  
8 “if [the seller is] aware that the potential transferee is in possession of a card authorizing the  
9 possession and use of marijuana under State law, then you have ‘reasonable cause to believe’  
10 that the person is an unlawful user of a controlled substance.” *Id.* Thus, the letter advised FFLs  
11 and provided them notice that the agency which issues their license (the BATFE) interpreted  
12 § 922 as not only criminalizing the *possession* of a firearm by a registry card holder, but also  
13 the *sale* of a firearm to a registry card holder.

14 In the fall of 2010, due to her struggle with severe dysmenorrhea, Plaintiff applied for  
15 and obtained a state marijuana registry card. (First Am. Compl. (“FAC”) ¶¶ 35–36, ECF No.  
16 34.) Plaintiff subsequently applied to purchase a firearm at a gun store in Mound House,  
17 Nevada. (*Id.* ¶¶ 17–24.) However, the store’s proprietor prevented her from completing her  
18 application he knew she carried a state marijuana registry card. (*Id.* ¶ 22.)

19 As a result, Plaintiff filed this lawsuit in October 2011. (Compl., ECF No. 1.) In her  
20 suit, Plaintiff challenges the constitutionality of the two provisions of the Gun Control Act that  
21 effectively criminalize the sale and possession of a firearm by the holder of a registry card: 18  
22 U.S.C. §§ 922(d)(3) and (g)(3). (FAC ¶¶ 51–56.) Plaintiff also challenges the constitutionality  
23 of one of the accompanying regulations, 27 C.F.R. § 478.11, that defines the term “unlawful  
24 user of or addicted to any controlled substance” as used in §§ 922(d)(3) and (g)(3). (*Id.*)  
25 Finally, Plaintiff challenges the ATF policy that federal firearms licensees may not sell a

1 firearm to persons they know are “in possession of a card authorizing the possession and use of  
2 marijuana under State law . . .” *ATF Open Letter*. Plaintiff claims that these provisions, along  
3 with the ATF policy, violate her Second Amendment right to “keep and bear Arms”; her First  
4 Amendment right to free speech; as well as her rights to substantive due process, procedural  
5 due process and equal protection as secured by the Fifth Amendment.

6 In response to Plaintiff’s initiating this action, Defendant filed a Motion to Dismiss.  
7 (Mot. to Dismiss, ECF No. 10.) Thereafter, on November 11, 2012, the Court held a hearing at  
8 which the Court ordered supplemental briefing on several issues. (Minutes of Proceedings, ECF  
9 No. 30.) Prior to the deadline for filing the supplemental briefing, the parties filed a Joint  
10 Motion to Amend/Correct Complaint. (ECF No. 31; *see* First Am. Compl. (“FAC”), ECF No.  
11 34.) After the Court granted this Motion, the Court denied Defendants’ previously filed Motion  
12 to Dismiss as moot. (ECF No. 32.) In response to Plaintiff’s First Amended Complaint, (ECF  
13 No. 34), Defendants filed the instant Motion to Dismiss (ECF No. 37), which, for the reasons  
14 discussed below, the Court grants.

## 15 **II. JURISDICTION**

16 “Federal courts are courts of limited jurisdiction. They possess only that power  
17 authorized by Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.  
18 375, 377 (1994). Therefore, before a federal court may consider the merits of a case, it must  
19 first determine whether it has proper subject matter jurisdiction. *Scott v. Pasadena Unified Sch.*  
20 *Dist.*, 306 F.3d 646, 653–54 (9th Cir. 2002); *see also Ex Parte McCardle*, 74 U.S. (7 Wall.)  
21 506, 514 (1868) (“Without jurisdiction the court cannot proceed at all in any cause.  
22 Jurisdiction is power to declare the law, and when it ceases to exist, the only function  
23 remaining to the court is that of announcing the fact and dismissing the cause.”).

24 For the reasons discussed below, the Court concludes that Plaintiff has, at this stage of  
25 the litigation, adequately established that she has standing to assert these causes of action. In

1 addition, the Court determines that this case is not rendered moot by the absence of a currently  
 2 valid medical marijuana registry card from the record. Accordingly, the Court does not lack  
 3 jurisdiction to consider the merits of this case.

#### 4 **A. Standing**

5 Article III of the United States Constitution limits the power of the judiciary to hear only  
 6 “cases” and “controversies.” U.S. Const. art. III, § 2; *see also Lujan v. Defenders of Wildlife*,  
 7 504 U.S. 555, 559–60 (1992). Standing is a core component of the Article III case or  
 8 controversy requirement and focuses on whether the action was *initiated* by the proper plaintiff.  
 9 *See Davis v. Fed. Election Comm’n*, 554 U.S. 724, 732–33 (2008) (quoting *Friends of Earth*,  
 10 *Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (“[T]he party invoking  
 11 federal jurisdiction [must] have standing—the ‘personal interest that must exist at the  
 12 commencement of the litigation.’”); *see also Arakaki v. Lingle*, 477 F.3d 1048, 1059 (9th Cir.  
 13 2007) (“Standing ensures that, no matter the academic merits of the claim, the suit has been  
 14 brought by a proper party.”). The “irreducible constitutional minimum of standing” requires  
 15 that a plaintiff demonstrate three elements. *Lujan*, 504 U.S. at 560.

16 First, the plaintiff must have suffered an injury in fact—an invasion of a legally  
 17 protected interest which is (a) concrete and particularized and (b) actual or  
 18 imminent, not conjectural or hypothetical. Second, there must be a causal  
 19 connection between the injury and the conduct complained of—the injury has to  
 20 be fairly traceable to the challenged action of the defendant, and not the result of  
 the independent action of some third party not before the court. Third, it must be  
 likely, as opposed to merely speculative, that the injury will be redressed by a  
 favorable decision.

21 *Id.* at 560–61 (internal quotation marks and citations omitted).

#### 22 **1. Injury in Fact**

23 Defendants’ argument that Plaintiff has failed to establish an injury in fact rests solely  
 24 on the fact that Plaintiff’s state marijuana registry card expired during litigation and the absence  
 25 of a new non-expired registry card from the record. (Mot. to Dismiss 12:3–16, ECF No. 37.)

1 However, the standing inquiry relies upon the facts as they existed when Plaintiff initiated this  
 2 action.<sup>1</sup> *See Davis v. Fed. Election Comm’n*, 554 U.S. 724, 732 (2008) (noting that the limits on  
 3 federal judicial power in Article III require “that the party invoking federal jurisdiction have  
 4 standing—the personal interest that must exist *at the commencement* of the litigation.”  
 5 (emphasis added) (internal quotation marks omitted)).

6 In this case, at the time that Plaintiff initiated this action, she held a valid state marijuana  
 7 registry card. (FAC ¶ 41, ECF No. 34; FAC Ex. 1-B, ECF No. 34-1.) It is precisely because  
 8 she held this card that the owner of the firearms store informed Plaintiff that “he could not sell  
 9 her a firearm without jeopardizing his federal firearms license.” (FAC ¶¶ 22–23.) As a result,  
 10 Plaintiff claims that she was deprived of several of her constitutional rights. (FAC ¶¶ 50–97.)  
 11 Therefore, Plaintiff has adequately alleged “an invasion of a legally protected interest which is  
 12 (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.”  
 13 *Lujan*, 504 U.S. at 560–61.

## 14 **2. Causal Connection**

15 The causation element of standing requires that “the injury . . . be fairly traceable to the  
 16 challenged action of the defendant, and not the result of the independent action of some third  
 17 party not before the court.” *Lujan*, 504 U.S. at 560–61. Defendants argue that Plaintiff cannot  
 18 satisfy the causation requirement of standing because her injury is “self-inflicted.” (Mot. to  
 19 Dismiss 13:3–4.) The Court disagrees.

20 True enough, injuries that are truly “self-inflicted” cannot serve as the basis for standing  
 21 because they are not fairly traceable to any action other than action by the plaintiff. *See, e.g.,*  
 22 *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (concluding that States that extended tax

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23  
 24 <sup>1</sup> Defendants’ “standing” argument is more appropriately characterized as a mootness argument, which the Court  
 25 addresses in Section II.B, below. *See Ctr. For Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007)  
 (observing that the “central question” in a mootness analysis is “whether changes in the circumstances that  
 prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief” (quotation marks  
 omitted)).



1 credits to their residents for income taxes paid in other states were suffering from self-inflicted  
2 injuries, “resulting from decisions by their respective state legislatures”). In this case,  
3 Defendants assert that their Open Letter advising FFLs to restrict the class of citizens with  
4 medical marijuana cards from purchasing firearms is an injury that these citizens are inflicting  
5 upon themselves. (Mot. to Dismiss 13:1–24.) Plaintiff alleges that her injury is her inability to  
6 purchase a firearm. (FAC ¶ 42, ECF No. 34.) Plaintiff further alleges that this injury resulted  
7 solely from the gun store owner’s reliance on the BATFE’s “open letter . . . [that] instructed  
8 firearms licensees to deny the sale of firearms or ammunition to any person whom the licensee  
9 is aware possesses a card authorizing such person to possess and use marijuana under state  
10 law.” (*Id.* ¶¶ 42–43.)

11 Thus, it appears to the Court that the causal connection between Defendants’ actions and  
12 Plaintiff’s alleged injury remains intact and Defendant has failed to provide the Court with any  
13 controlling or adequately persuasive legal authority to support a conclusion that the injury is  
14 self-inflicted or an independent action of some third party not before the court. *See, e.g.*,  
15 *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (finding a self-inflicted injury when the  
16 injury resulted from the plaintiff state’s legislature’s decision to provide a tax refund for  
17 income taxes paid by residents to a different state); *Nat’l Family Planning & Reproductive*  
18 *Health Ass’n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (concluding the injury was self-  
19 inflicted when the association could have resolved an alleged conflict between a statute and a  
20 regulation by inquiring about the conflict with the agency responsible for administering the  
21 regulation); *Ass’n for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental*  
22 *Retardation Center Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) (“The mere fact that an  
23 organization redirects some of its resources to litigation and legal counseling in response to  
24 actions or inactions of another party is insufficient to impart standing upon the organization.”).

### 3. *Redressability*

Defendant finally argues that Plaintiff's claims would not be redressable by a declaration on the constitutionality of the challenged statutes, regulations and policies because an unchallenged statute, 18 U.S.C. § 922(b)(2), would still act to prevent FFLs from selling a firearm to Plaintiff. (Mot. to Dismiss 13:25–14:10, ECF No. 37.) Specifically, § 922(b)(2) prohibits a FFL from selling a firearm “to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law . . .” 18 U.S.C. § 922(b)(2).

There is a similar state law, § 202.360(1)(c) of the Nevada Revised Statute, which prohibits an individual from possessing a firearm if that individual “[i]s an unlawful user of, or addicted to, any controlled substance.” Nev. Rev. Stat. § 202.360(1)(c). Furthermore, § 202.360 incorporates its definition of “controlled substance” from the federal Controlled Substances Act, which, as discussed above, includes marijuana. Nev. Rev. Stat. § 202.360(3)(a) (“‘Controlled substance’ has the meaning ascribed to it in 21 U.S.C. § 802(6).”). *See generally* 21 U.S.C. § 802(6) (“The term ‘controlled substance’ means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V . . .”); 21 U.S.C. § 812(b)(1) (defining a Schedule I controlled substance as a “drug or substance [with] a high potential for abuse”; “a drug or substance [that] has no currently accepted medical use in treatment in the United States”; and a drug or substance for which “[t]here is a lack of accepted safety for use . . . under medical supervision”); 21 U.S.C. § 812(b)(1)(Sched. I)(c)(10) (listing “marihuana” as a Schedule I controlled substance).

However, Defendants have failed to provide any Nevada state law or regulation whereby state marijuana registry cardholders have been similarly interpreted to be prohibited from purchasing firearms under state law solely based on the buyer's possession of a registry card. Furthermore, these state statutes fail to address the heart of the issue in this case: whether the

1 BATFE's policy interpreting the possession of a state marijuana registry card as providing an  
2 FFL with "reasonable cause to believe" that the holder of the card is a user of a controlled  
3 substance, thus prohibiting any sale of firearms or ammunition to Plaintiff, is a violation of her  
4 constitutional rights. (*See* FAC ¶¶ 43–44, ECF No. 34; FAC Ex. 2-B, ECF No. 34-2.)  
5 Therefore, Defendants argument fails and the Court finds that the relief that Plaintiff seeks in  
6 this action would likely remedy her alleged injury.

7 **B. Mootness**

8 Although Defendants presented their jurisdiction-based argument as relating to standing,  
9 the Court finds this argument is more properly characterized as one directed to the doctrine of  
10 mootness. The Supreme Court often defines mootness as "the doctrine of standing set in a time  
11 frame: The requisite personal interest that must exist at the commencement of the litigation  
12 (standing) must continue throughout its existence (mootness)." *U.S. Parole Comm'n v.*  
13 *Geraghty*, 445 U.S. 388, 397 (1980) (quotation marks omitted). When faced with the question  
14 of whether a case has been rendered moot, the "central question" is "whether changes in the  
15 circumstances that prevailed at the beginning of the litigation have forestalled any occasion for  
16 meaningful relief." *Ctr. For Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007).

17 At first glance, the issues that Plaintiff raises would appear moot because the record  
18 lacks a currently valid registry card. Specifically, the state marijuana registry card that Plaintiff  
19 attached to the FAC expired on March 10, 2012. (FAC Ex. 1-B, ECF No. 34-1.) In an effort to  
20 cure this defect, Plaintiff attached a renewed registry card to her Response to Defendants'  
21 Motion to Dismiss, however, due to the duration of litigation in this case, that registry card has  
22 now also expired as well; it expired on March 10, 2013. (Resp. Ex. A, ECF No. 41-1.) Plaintiff  
23 has failed to further supplement the record with an additional registry card and, thus, there is no  
24 valid registry card currently on the record. Accordingly, this defect would appear to render this  
25 case technically moot.

1           However, the Supreme Court has established an exception to the general principles of  
2 mootness for cases that implicate wrongs that are “capable of repetition yet evad[e] review.” *S.*  
3 *Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514–15 (1911); *Weinstein v. Bradford*, 423 U.S. 148–  
4 49 (1975). This exception applies when two elements are satisfied: “(1) the challenged action  
5 was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there  
6 [is] a reasonable expectation that the same complaining party would be subjected to the same  
7 action again.” *Weinstein*, 423 U.S. at 149.

8           As discussed below, the Court finds that Plaintiff has established each of the two  
9 elements of the “capable of repetition yet evading review” exception.

10                     **1.     Duration**

11           To determine whether an issue “evades review,” the Ninth Circuit has instructed courts  
12 to consider whether “the underlying action is almost certain to run its course before [the federal  
13 courts] can give the case full consideration.” *Alaska Ctr. For Env’t v. U.S. Forest Serv.*, 189  
14 F.3d 851, 855 (9th Cir. 1999). The Supreme Court has previously held that eighteen months  
15 was insufficient time to accommodate complete judicial review. *See First Nat’l Bank v. Bellotti*,  
16 435 U.S. 765, 774 (1978). Similarly, the Ninth Circuit has held that the issuance of a two-year  
17 permit is sufficiently short in duration to evade review. *Alaska Ctr. For Env’t*, 189 F.3d at 855.

18           Nevada law provides for the issuance of registry cards that expire one year after the  
19 issuance. *See Nev. Rev. Stat. § 453A.230* (providing that a registry card “shall be deemed  
20 expired” if the holder fails to, among other things, submit annual updates from the holder’s  
21 attending physician). Because the duration of the validity of the registry card is too short to  
22 allow full litigation before the registry card expires, the Court concludes that the duration  
23 element of the exception is satisfied.

1                   **2.     Repetition**

2           “The second prong of the repetition/evasion exception requires some indication that the  
3 challenged conduct will be repeated.” *Alaska Ctr. For Env’t v. U.S. Forest Serv.*, 189 F.3d 851,  
4 856 (9th Cir. 1999). More recently, the Ninth Circuit has articulated that the prong requires a  
5 “reasonable expectation that the same party will confront the same controversy again.” *W.*  
6 *Coast Seafood Processors Ass’n v. Natural Res. Def. Council, Inc.*, 643 F.3d 701, 704 (9th Cir.  
7 2011) (internal quotation marks omitted).

8           In the present case, Plaintiff’s FAC alleges sufficient facts from which the Court can  
9 conclude that Plaintiff will confront this issue again in the future. Specifically, the FAC alleges  
10 that Plaintiff has exhibited a sincere interest in “the use of cannabis for medical purposes” for at  
11 least three years. (FAC ¶¶ 27–28, ECF No. 34.) The FAC further alleges that Plaintiff first  
12 applied for a registry card for treatment of her dysmenorrhea, a condition with which she has  
13 struggled since she was ten years of age. (*Id.* ¶ 35.) Plaintiff has battled this condition for more  
14 than three decades. (*See* FAC Ex. 1-B.) Finally, neither party has provided any indication that  
15 Plaintiff’s dysmenorrhea has subsided to the point that she no longer qualifies for a state  
16 marijuana registry card.

17           Because Plaintiff’s FAC alleges sufficient facts to satisfy both prongs, the Court  
18 concludes that this case meets the “capable of repetition yet evading review” exception to the  
19 mootness doctrine. Therefore, the Court finds that the issues presented by this action are not  
20 mooted by the expiration of Plaintiff’s state marijuana registry card or the absence of a  
21 currently valid state marijuana registry card from the record. The fact that Plaintiff possessed a  
22 valid card at the time of the alleged injury and renewed the card for at least one more year is  
23 sufficient. Accordingly, the Court may properly assert subject matter jurisdiction over this  
24 action.  
25

### 1 **III. MOTION TO DISMISS**

#### 2 **A. Legal Standard**

3 When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim,  
 4 dismissal is appropriate only when the complaint does not give the defendant fair notice of a  
 5 legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550  
 6 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the  
 7 Court will take all material allegations as true and construe them in the light most favorable to  
 8 the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

9 The Court, however, is not required to accept as true allegations that are merely  
 10 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*  
 11 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action  
 12 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a  
 13 violation is *plausible*, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing  
 14 *Twombly*, 550 U.S. at 555) (emphasis added).

15 If the court grants a motion to dismiss, it must then decide whether to grant leave to  
 16 amend. The court should “freely give” leave to amend when there is no “undue delay, bad  
 17 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by  
 18 virtue of . . . the amendment, [or] futility of the amendment . . .” Fed. R. Civ. P. 15(a); *Foman*  
 19 *v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear  
 20 that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow*  
 21 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

#### 22 **B. Second Amendment Claim**

23 The Second Amendment protects “the right of the people to keep and bear Arms” from  
 24 government infringement. U.S. Const. amend. II. Moreover, the Supreme Court has held that  
 25 this right is an individual right. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

1 However, the Court also held that this individual right is “not unlimited” and that, for example,  
2 prohibitions on the possession of firearms by felons and the mentally ill are presumptively  
3 lawful. *Id.* at 626–27; *see also id.* at 627 n.26 (“We identify these presumptively lawful  
4 regulatory measures only as examples; our list does not purport to be exhaustive.”).

5 In this case, Plaintiff challenges both § 922(d)(3) and § 922(g)(3) under the Second  
6 Amendment. The Court analyzes each section individually.

7 **1. Section 922(g)(3)**

8 Section 922(g)(3) prohibits users of a controlled substance from possessing a firearm. 18  
9 U.S.C. § 922(g)(3). Plaintiff’s FAC states that this law infringes upon her right to keep and  
10 bear arms under the Second Amendment. (FAC ¶ 54, ECF No. 34.) However, Plaintiff’s FAC  
11 fails as a matter of law because the Ninth Circuit has already upheld the constitutionality of  
12 § 922(g)(3). *United States v. Dugan*, 657 F.3d 998, 999–1000 (9th Cir. 2011). In *Dugan*, based  
13 on the Supreme Court’s acknowledgement that the individual right to possess and carry  
14 weapons is not unlimited, the Ninth Circuit observed that “[h]abitual drug users, like career  
15 criminals and the mentally ill, more likely will have difficulty exercising self-control,  
16 particularly when they are under the influence of controlled substances.” *Id.* at 999 (citing  
17 *Heller*, 554 U.S. at 592). The court further noted an important distinction between the  
18 subsections of § 922 expressly discussed by the Supreme Court in *Heller* and 922(g)(3):

19 [U]nlike people who have been convicted of a felony or committed to a mental  
20 institution and so face a lifetime ban, an unlawful drug user may regain his right  
21 to possess a firearm simply by ending his drug abuse. The restriction in  
§ 922(g)(3) is far less onerous than those affecting felons and the mentally ill.

22 *Dugan*, 657 F.3d at 999. Therefore, given this distinction and the danger presented by users of  
23 controlled substances, the Ninth Circuit joined the Seventh and Eighth Circuits by broadly  
24 holding that “Congress may . . . prohibit illegal drug users from possessing firearms.” *Id.* at  
25 999–1000.

1 Plaintiff first feebly attempts to discredit *Dugan* by stating that *Dugan* “is a deeply  
2 flawed opinion, lacking any meaningful legal analysis . . .” (Resp. 22:11–13, ECF No. 41.)  
3 However, *Dugan* remains controlling authority on this Court. Furthermore, this Court lacks the  
4 authority to overrule a Ninth Circuit decision.

5 Next, Plaintiff unpersuasively attempts to distinguish her case from the facts in *Dugan*.  
6 Specifically, Plaintiff argues that “Mr. Dugan was the very sort of person that § 922(g)(3) was  
7 designed for—a dangerous criminal.” (Resp. 22:22–24.) Plaintiff argues that this law is  
8 overbroad because it affects “nearly half of the U.S. population.” (*Id.* 22:26–23:2.) However,  
9 Plaintiff’s argument is “deeply flawed.” Whether nearly half of the U.S. population engages in  
10 conduct that is illegal under federal law does not affect the illegality of that conduct. *ATF Open*  
11 *Letter* (stating that “[t]he Federal government does not recognize marijuana as a medicine); *see*  
12 *also* 21 U.S.C. § 812(b)(1), Sched. I(c)(10) (listing “marihuana” as a Schedule I illegal  
13 controlled substance).

14 Because *Dugan* resolves Plaintiff’s Second Amendment attack of § 922(g)(3), the Court  
15 need not undergo an independent constitutional analysis. Therefore, the Court dismisses  
16 Plaintiff’s Second Amendment challenge to § 922(g)(3). In light of *Dugan*, any amendment of  
17 this claim would be futile and, thus, Plaintiff’s Second Amendment challenge to § 922(g)(3) is  
18 dismissed with prejudice.

## 19 **2. Section 922(d)(3)**

20 Section 922(d)(3) prohibits the sale of a firearm to any person whom the seller knows or  
21 has “reasonable cause to believe . . . is an unlawful user of . . . a controlled substance . . .” 18  
22 U.S.C. § 922(d)(3). In addition, the BATFE Open Letter at issue in this case advised that an  
23 FFL has “reasonable cause to believe” that a potential buyer is an unlawful user of a controlled  
24 substance within the meaning of the Gun Control Act if the FFL is aware that the potential  
25 buyer or transferee possesses a registry card. *See ATF Open Letter*. Thus, under the BATFE’s



1 interpretation of “reasonable cause to believe,” FFLs are prohibited from selling or transferring  
 2 firearms or ammunition to the holder of a registry card. *ATF Open Letter*; *see also* 18 U.S.C.  
 3 § 922(d)(3).

4 In Plaintiff’s FAC, she alleges that this law infringes and imposes an impermissible  
 5 burden on her right to keep and bear arms under the Second Amendment. (FAC ¶¶ 54–55, ECF  
 6 No. 34.) The Court recognizes that, in *Dugan*, the Ninth Circuit addressed only the  
 7 constitutionality of § 922(g)(3). *See Dugan*, 657 F.3d at 999–1000. However, the reasoning  
 8 that supports the Court’s determination that Plaintiff’s FAC fails to state a plausible claim  
 9 challenging § 922(g)(3) applies equally to Plaintiff’s challenge to section (d)(3) of the same  
 10 statute. Just as Congress may constitutionally preclude illegal drug users from *possessing* a  
 11 firearm, Congress likewise may preclude FFLs from *selling* firearms to illegal drug users and  
 12 thereby prevent such prohibited persons from *acquiring* firearms. *See Dugan*, 657 F.3d at 999–  
 13 1000.

14 For these reasons, the Court dismisses Plaintiff’s Second Amendment challenge to  
 15 § 922(d)(3). Because the Court concludes that amendment of this claim would be futile,  
 16 Plaintiff’s Second Amendment challenge to § 922(d)(3) is dismissed with prejudice.

### 17 **3. 27 C.F.R. 478.11**

18 In addition to challenging the two subsections of § 922, Plaintiff also claims that the  
 19 BATFE’s policies and regulations impermissibly infringe on her Second Amendment right.  
 20 (FAC ¶¶ 54–55, ECF No. 34.) Plaintiff identifies 27 C.F.R. § 478.11 and alleges the definition  
 21 of “unlawful user...” contained therein imposes an impermissible burden on her Second  
 22 Amendment right.<sup>2</sup> However, Plaintiff fails to plead any facts establishing that the term

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23  
 24 <sup>2</sup> 27 C.F.R. § 478.11 expressly defines “[u]nlawful user of or addicted to any controlled substance” as:  
 25 A person who uses a controlled substance and has lost the power of self-control with reference  
 to the use of controlled substance; and any person who is a current user of a controlled substance  
 in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of  
 drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful

“unlawful user,” as defined in 27 C.F.R. § 478.11, itself, imposes an impermissible burden on her Second Amendment right. (*See* FAC ¶¶ 54–55.) Thus, in reality, Plaintiff’s FAC appears to target only the BATFE’s Open Letter. In addition, Plaintiff’s Opposition fails to object to Defendants’ assertions that Plaintiff failed to adequately plead a constitutional challenge to § 478.11. Rather, Plaintiff’s Opposition merely references alleged contradictions between 27 C.F.R. § 478.11 and the BATFE’s Open Letter in her attempt to establish the unconstitutionality of the policy announced in the Open Letter. (Resp. 11:25–12:28, ECF No. 41.) For this reason, the Court GRANTS Defendant’s Motion to Dismiss as it relates to the constitutionality of 27 C.F.R. § 478.11.

Even to the extent that Plaintiff does allege that § 478.11 infringes her Second Amendment rights, her claim fails because § 478.11 is consistent with 21 U.S.C. § 802, which provides that the possession and use of marijuana is prohibited by federal law. Plaintiff correctly notes that the definition of “unlawful user” excludes any person using a controlled substance in a manner “as prescribed by a licensed physician.” 27 C.F.R. § 478.11. However, marijuana is categorized by federal law as a Schedule I controlled substance under 21 U.S.C. § 812(c)(Schedule I)(c)(10). Controlled substances in Schedule I are defined by statute as having “no currently accepted medical use in treatment in the United States.” 21 U.S.C. § 812(b)(1)(B); *see also United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491

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use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year. For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, nonjudicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.

(2001) (recognizing the statutory determination that “marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project)”). Therefore, a regulation that prohibits any user of marijuana from possessing a firearm or ammunition is also consistent with 18 U.S.C. § 922(g)(3), which, as discussed above in Section III.B.1, the Ninth Circuit has previously found to be constitutional in *Dugan*. Accordingly, all the reasons that support the constitutionality of the statutes related to the sale and possession of firearms equally apply to 27 C.F.R. § 478.11.

#### 4. *BATFE’s Open Letter*<sup>3</sup>

Plaintiff begins her Response to Defendants’ Motion to Dismiss her Second Amendment claims by reciting a string of objections to the BATFE’s failure to engage in “notice and comment” prior to issuing the Open Letter. (Resp. 9:26–10:12, ECF No. 41.) The Court recognizes that citizens may seek review of an agency’s action that allegedly violates the Administrative Procedures Act (“APA”). *See* 5 U.S.C. § 702 (waiving sovereign immunity and providing a private cause of action for “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute”). However, Plaintiff’s argument is puzzling given her failure to include a cause of action for violations of the APA in her FAC. (*See* FAC ¶¶ 50–97, ECF No. 34.) Thus, Plaintiff’s assertions based on the APA, including any contradiction between the Open Letter and 27 C.F.R. § 478.11, cannot save her Second Amendment claim; a claim alleging violations of the APA is separate from a claim alleging violations of the right secured by the Second

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<sup>3</sup> Plaintiff’s argument that the policy in the Open Letter violates the Second Amendment because “more than half of the U.S. population” uses marijuana is absurd at best. The mere fact that many people engage in illegal activity does not alter the illegal nature of the activity. Furthermore, the fact that the use of marijuana may be legal under the laws in some states does not later the illegality of this use under federal law. *See Gonzales v. Raich*, 545 U.S. 1 (2005) (It is well settled that Congress has authority under the Commerce clause to criminalize marijuana possession, even if such possession is not also illegal under state law); *see also Raich v. Gonzales* (“*Raich II*”), 500 F.3d 850, 861–64 (9th Cir. 2007) (holding, on remand from the Supreme Court, that there is no Ninth Amendment or substantive due process right to use marijuana for claimed medical purposes).

Amendment.<sup>4</sup>

### C. First Amendment Claim

In Plaintiff's FAC, she asserts that the First Amendment confers a right to exercise "certain non-verbal and communicative conduct, which, in this case, includes, without limitation, the acquisition, possession, and acknowledgment of possession of a medical marijuana registry card validly issued pursuant to state law." (FAC ¶ 82, ECF No. 34.) Thus, Plaintiff contends that "[b]y acquiring, possessing, and acknowledging possession of a medical marijuana registry card, Plaintiff is exercising her First Amendment right to free speech." (*Id.* ¶ 85.) Plaintiff alleges that her possession of a registry card is a "tangible symbol" of her "deeply held beliefs that marijuana should be legal for medical use"; her "belief and opinion that her fellow citizens of Nevada were correct to have forced changes to Nevada law legalizing marijuana for medical use"; and her "belief and opinion that citizens in each state have a right to decide whether marijuana should be legal for medical purposes." (*Id.* ¶¶ 87–90.) Plaintiff further contends that "Defendants are also attempting to deter her from exercising her First Amendment rights in the future by requiring that she give up her First Amendment rights in exchange for her Second Amendment rights."<sup>5</sup> (*Id.* ¶ 95.)

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<sup>4</sup> The Court will not grant leave to amend because the Court holds that amendment would be futile. Interpretative rules are excepted from the requirement that an agency provide notice and an opportunity for public comment prior to promulgating a rule. 5 U.S.C. § 553(b)–(c). Because the statements in the Open Letter are textbook interpretative, notice and comment would not be required. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 88 (1995) (describing an interpretative rule as one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers"); *see also Hepm Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003) ("[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule. Legislative rules, on the other hand, create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." (internal citations omitted)). The Open Letter simply interprets existing law and provides guidance to the FFLs on how the laws, under which the FFLs operate, apply to the new circumstance of states exempting from prosecution the use of marijuana for medical purposes. Furthermore, because the use of marijuana is illegal under federal law, regardless of the user's purpose, the Open Letter cannot be said to change existing law. Accordingly, any attempt to amend the FAC to include a cause of action for failure to engage in notice and comment under 5 U.S.C. § 553 would be futile. Therefore, the Court declines to grant leave to amend.

<sup>5</sup> Plaintiff's FAC also alleges that "Defendants are retaliating against Plaintiff's exercise of her First Amendment rights by denying her Second Amendment right." (FAC ¶ 94, ECF No. 34.) Defendant categorizes this

## 1                   **1.     Applicable Legal Standards**

2           It is well-established that the First Amendment’s protection “does not end at the spoken  
3 or written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Rather, certain conduct “may be  
4 sufficiently imbued with elements of communication to fall within the scope of the First . . .  
5 Amendment[.]” *Id.* (internal quotation marks omitted). However, the Supreme Court has  
6 repeatedly “rejected ‘the view that an apparently limitless variety of conduct can be labeled  
7 ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.’” *Id.*  
8 (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968)).

9           To determine whether conduct possesses sufficient “elements of communication,” courts  
10 engage in a two-pronged analysis. First, courts determine “whether ‘an intent to convey a  
11 particularized message was present.’” *Texas v. Johnson*, 491 U.S. at 404 (quoting *Spence v.*  
12 *Washington*, 418 U.S. 405, 410–11 (1974)). Second, courts look to “whether ‘the likelihood  
13 was great that the message would be understood by those who viewed it.’” *Texas v. Johnson*,  
14 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 411).

## 15                   **2.     Discussion**

16           Even assuming that Plaintiff has adequately pleaded the two prongs of the *Spence* test  
17 for when conduct is expressive, Plaintiff’s claim fails under the analysis applying the correct  
18

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19 allegation as a “First Amendment ‘retaliation claim.’” (Mot. to Dismiss 35 n.23, ECF No. 37.) In Plaintiff’s  
20 Response brief, she seems to indicate that that this allegation is more related to a claim under the  
21 “unconstitutional condition” doctrine. (Resp. 23:22–25, ECF No. 41 (“The Defendants have effectively given the  
22 Plaintiff a Hobson’s Choice between her First and Second Amendment Rights: *you can either exercise your right to free expression, or you can exercise your right to keep and bear arms, but you can’t have both.*”)); *see also*  
23 *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (holding that “[t]o deny an exemption to claimants who engage in  
24 certain forms of speech is in effect to penalize them for this speech.”). Regardless of how this allegation is  
25 characterized, the claim fails. First, Plaintiff has not set forth facts adequate to suggest that the passage of  
§ 922(g)(3), § 922(d)(3), the promulgation of 27 C.F.R. § 478.11, or the distribution of the Open Letter, was  
motivated by retaliation for any communicative conduct by Plaintiff. Additionally, *Speiser* cautions that  
conditions which “have the effect of coercing the claimants to refrain from the proscribed speech” are suspect.  
357 U.S. at 519. However, in this case, any such “condition” does not affect the actual speech, *i.e.*, promoting  
the medical benefits of marijuana, but relates only to the underlying conduct of obtaining and possessing a  
medical marijuana registry card.

1 level of scrutiny.

2 Plaintiff asserts that this Court must apply strict scrutiny to the challenged policy.  
 3 Plaintiff is mistaken. Strict scrutiny applies only when the government “proscribe[s] particular  
 4 conduct *because* it has expressive elements” or enforces a “law *directed* at the communicative  
 5 nature of conduct.”<sup>6</sup> *Texas v. Johnson*, 491 U.S. at 406 (quotation marks omitted). Similarly,  
 6 the Ninth Circuit has stated that the *O’Brien* analysis, rather than strict scrutiny, applies  
 7 whenever the “conduct . . . merely contains an expressive component . . . more akin to . . .  
 8 burning a draft card (an example of conduct that can be used to express an idea but does not  
 9 necessarily do so).” *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059 (9th Cir. 2010)  
 10 (citing *O’Brien*, 391 U.S. at 376). The acts of obtaining and possessing a marijuana registry  
 11 card are classic examples of “conduct that can be used to express an idea but does not  
 12 necessarily do so.” Plaintiff may well have obtained her registry card as a form of expression,  
 13 but that is not necessarily true of all individuals who obtain a medical marijuana registry card.  
 14 Accordingly, Plaintiff’s assertion that strict scrutiny applies is incorrect; the standard  
 15 announced by the Supreme Court in *O’Brien* supplies the appropriate standard of review for the  
 16 statutes, regulation, and policy that Plaintiff challenges.

17 Under *O’Brien*, even after a court determines that the conduct at issue implicates the  
 18 First Amendment, “it does not necessarily follow that [the conduct at issue] is constitutionally  
 19 protected activity.” 391 U.S. at 376. “[W]hen ‘speech’ and ‘nonspeech’ elements are combined  
 20 in the same course of conduct, a sufficiently important governmental interest in regulating the  
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22  
 23 <sup>6</sup> Plaintiff asserts that “the DOJ, and by extension the ATF, enacted the Open Letter with the deliberate intent to  
 24 suppress the growing medical marijuana movement.” (Resp. 26:17–19, ECF No. 41.) For this reason, Plaintiff  
 25 asserts that the Court must apply strict scrutiny to the challenged policy. (*Id.* 26:28–27:2.) However, the  
 Supreme Court rejected a similar argument in *O’Brien* because “under settled principles the purpose of  
 Congress . . . is not a basis for declaring this legislation unconstitutional.” 391 U.S. at 382–83 (rejecting the  
 argument that a statute prohibiting the destruction or mutilation of selective service registration certificates was  
 unconstitutional because it was the “‘purpose’ of Congress to ‘suppress freedom of speech’”).

1 nonspeech element can justify incidental limitations on First Amendment freedoms.” *Id.* More  
2 specifically:

3 a government regulation is sufficiently justified if it is within the constitutional  
4 power of the Government; if it furthers an important or substantial governmental  
5 interest; if the governmental interest is unrelated to the suppression of free  
6 expression; and if the incidental restriction on alleged First Amendment freedoms  
7 is no greater than is essential to the furtherance of that interest.

8 *Id.* at 377.

9 Here, Plaintiff fails to establish that this policy fails the test articulated by the Supreme  
10 Court in *O’Brien*. First, neither party asserts that the Government lacks the constitutional  
11 authority to regulate the possession and sale of firearms. Second, the challenged policy furthers  
12 the important governmental interest of protecting public safety and preventing violent crime.  
13 *See United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011) (recognizing the “danger in  
14 allowing habitual drug users to traffic in firearms because . . . [they] more likely will have  
15 difficulty exercising self-control, particularly when they are under the influence of controlled  
16 substances”). Third, this interest is unrelated to the suppression of free expression. Finally,  
17 any restriction on Plaintiff’s First Amendment right is no greater than necessary to further this  
18 interest. Specifically, the policy does not prohibit individuals from advocating for the  
19 legalization of marijuana for medicinal purposes. Similarly, the policy does not prevent any  
20 known advocate of the medical benefits of marijuana from obtaining a firearm. Instead, this  
21 policy is tailored to prevent users of marijuana, a controlled substance, from possessing a  
22 firearm by presuming that an individual who undertakes the “exceedingly difficult and lengthy  
23 process” of obtaining a medical marijuana card, (Resp. 25:2–8), is actually using marijuana.  
24 For these reasons, any infringement of Plaintiff’s First Amendment right is incidental to an  
25 important governmental interest of reducing the threat caused by gun violence. Plaintiff cannot  
show that, under *O’Brien*, these statutes, regulation, and policy impermissibly infringe her right



1 of expression as secured by the First Amendment. Accordingly, her First Amendment claim  
2 fails and must be dismissed with prejudice.

3 **D. Substantive Due Process Claim**

4 Substantive due process refers to the protection of “those fundamental rights and  
5 liberties which are, objectively, deeply rooted in this Nation’s history and tradition.”  
6 *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (internal quotation marks omitted). In  
7 Plaintiff’s FAC, she asserts that her “right to possess a handgun *under the Second Amendment*  
8 is objectively deeply rooted in the Nation’s history and tradition and implicit in the concept of  
9 ordered liberty such that neither liberty nor justice would exist if they were sacrificed.” (FAC  
10 ¶ 75, ECF No. 34 (emphasis added).) Similarly, Plaintiff asserts that she “possesses a  
11 fundamental right to free speech *under the First Amendment* which includes certain non-verbal  
12 speech . . .” (*Id.* ¶ 77 (emphasis added).)

13 The Supreme Court has long foreclosed this type of claim. For this reason, Plaintiff’s  
14 cause of action for violations of the substantive due process clause of the 5th Amendment fails  
15 and must be dismissed. Specifically, more than two decades ago, the Supreme Court first held  
16 that “[w]here a particular Amendment provides an explicit textual source of constitutional  
17 protection against a particular sort of government behavior, that Amendment, not the more  
18 generalized notion of substantive due process, must be the guide for analyzing these claims.”  
19 *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395  
20 (1989)) (internal quotation marks omitted). In fact, the Supreme Court has employed this  
21 principle to countless amendments. For example, in *Stop the Beach Renourishment, Inc. v.*  
22 *Florida Department of Environmental Protection*, the Court noted that “[t]he first problem with  
23 using Substantive Due Process to do the work of the Takings Clause is that we have held it  
24 cannot be done.” 560 U.S. 702, 721 (2010) (citing *Albright*, 510 U.S. at 273). Similarly, in  
25 *Turner v. Rogers*, the Court concluded that a criminal defendant could not use the Due Process



1 Clause to assert a claim for violations of his Sixth Amendment right to appointed counsel. 131  
 2 S. Ct. 2507, 2522 (2011) (“[W]e do not read a general provision to render a specific one  
 3 superfluous.”).

4 Plaintiff attempts to salvage this claim by arguing that the provisions in her FAC that  
 5 refer to her First and Second Amendment rights, (FAC ¶¶ 75–77), “such provisions in the FAC  
 6 do not waive Plaintiff’s previous assertion that she possess [sic] a liberty right in the ability to  
 7 choose a course of medical treatment . . .” (Resp. 29:1–5, ECF No. 41.) This argument is  
 8 fatally flawed for at least two reasons. First, Plaintiff cannot attempt to cure defects in her  
 9 complaint by including the necessary allegations in her opposition brief. *See Broam v. Bogan*,  
 10 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) (noting that a court may not look beyond the complaint  
 11 to plaintiff’s briefs when determining the propriety of a motion to dismiss for failure to state a  
 12 claim). Second, the Ninth Circuit’s opinion in *Raich v. Gonzales*, forecloses any claim that  
 13 Plaintiff has a fundamental right to use marijuana for medical reasons.<sup>7</sup> 500 F.3d 850, 861–66  
 14 (9th Cir. 2007).

15 For these reasons, the Court concludes that Plaintiff has not and cannot state a claim for  
 16 violations of the substantive due process claim. Because the Court finds that amendment would  
 17 be futile, this cause of action is dismissed with prejudice.

#### 18 **E. Procedural Due Process Claim**

19 In Plaintiff’s FAC, she alleges that “Defendants have denied the Plaintiff adequate  
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21 <sup>7</sup> The Supreme Court has recognized that there are fundamental rights associated with choosing one’s medical  
 22 treatment. *See Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992) (recognizing a women’s right to  
 23 an abortion); *Eisenstad v. Baird*, 405 U.S. 438 (1972) (recognizing the right to use contraception); *Cruzan v.*  
 24 *Dir., Mo. Dept. of Health*, 497 U.S. 267, 279 (1990) (recognizing the right to “refuse lifesaving hydration and  
 25 nutrition”). However, the Court has never recognized an unqualified constitutional right to any medical  
 treatment that a patient desires. In fact, in *Raich v. Gonzales*, the Ninth Circuit held that there was no  
 constitutionally protected right to use marijuana for medicinal purposes. 500 F.3d 850, 864 (9th Cir. 2007)  
 (stating that “federal law does not recognize a fundamental right to use medical marijuana prescribed by a  
 licensed physician to alleviate excruciating pain and human suffering”). Thus, the Ninth Circuit’s holding in  
*Raich v. Gonzales* effectively precludes Plaintiff’s argument that she has a fundamental right to engage in the  
 exact course of treatment that she and her physician deem best.

1 procedural protections before depriving her of her right to purchase and possess a firearm.”  
2 (FAC ¶ 71, ECF No. 34.) However, because Plaintiff has failed to identify a constitutionally  
3 protected liberty or property interest, as required by the Fifth Amendment, her claim fails and  
4 must be dismissed.

5 The relevant portion of the Fifth Amendment provides that “No person shall . . . be  
6 deprived of life, liberty, or property, without due process of law . . .” U.S. Const. amend. V.  
7 To successfully allege a procedural due process claim, plaintiffs must provide sufficient facts  
8 establishing the plausible existence of two elements: “(1) a deprivation of a constitutionally  
9 protected liberty or property interest, and (2) a denial of adequate procedural protections.”  
10 *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998). The  
11 Court need not reach the second element because Plaintiff has not alleged that Defendants  
12 deprived her of a constitutionally protected liberty or property interest. *See Bd. of Regents v.*  
13 *Roth*, 408 U.S. 564, 569 (holding that adequate procedural protections are required only when  
14 the plaintiff has been deprived of a liberty or property interest).

15 In her opposition brief, Plaintiff first asserts that “[t]he United States Constitution  
16 requires that whenever a governmental body acts to injure an individual, that act must be  
17 consonant with due process of law.” (Resp. 30:17–18, ECF No. 41.) Plaintiff concludes that  
18 Defendants’ determination that those persons that possess a registry card fit the definition of an  
19 “unlawful user of a controlled substance” deprives her of a right without adequate procedure.  
20 (*Id.* at 31:14–22.) However, Plaintiff fails to recognize that she must articulate a  
21 “constitutionally protected *liberty* or *property* interest” before her procedural due process claim  
22 may proceed. Therefore, Plaintiff’s discussion of any procedural inadequacies is insufficient to  
23 defeat Defendants’ Motion to Dismiss. Because Plaintiff cannot identify a constitutionally  
24 protected *liberty* or *property* interest, she cannot state a procedural due process claim and the  
25 Court must dismiss her claim with prejudice.

**F. Equal Protection Claim**

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Although the Fourteenth Amendment applies only to state action, the Due Process Clause of the Fifth Amendment, which does apply to the federal government, encompasses the protections of the Equal Protection Clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The equal protection component of the Due Process Clause is “essentially a direction that all persons similarly situated be treated alike.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). To state a valid claim under the equal protection component of the Fifth Amendment, Plaintiff “must show that the statute in question results in members of a certain group being treated differently from other persons based on membership in that group.” *Sagana v. Tenorio*, 384 F.3d 731, 740 (9th Cir. 2004) (internal quotation marks omitted); *see also Gonzalez-Medina v. Holder*, 641 F.3d 333, 336 (9th Cir. 2011) (“To establish an equal protection violation, [the plaintiff] must show that she is being treated differently from similarly situated individuals.”).

Plaintiff’s FAC first alleges that she “is being treated differently from persons who are prescribed medical marijuana in states where the obtainment of a state-issued medical marijuana registry card is not required.” (FAC ¶ 62, ECF No. 34.) This statement is insufficient to state an equal protection claim. The laws, regulation, and policy that Plaintiff challenges are neither “applied in a discriminatory manner,” nor does it “impose[] different burdens on different classes of people.” *See Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). Plaintiff’s argument simply acknowledges that marijuana users in states that do not require registry cards may more easily evade and violate federal law. *See United States v. Hendrickson*, 664 F. Supp. 2d 793, 798 (E.D. Mich. 2009) (“There is no right under the Constitution to have the law go unenforced against you, even if you are the first person against

1 whom it is enforced . . . . The law does not need to be enforced everywhere to be legitimately  
 2 enforced somewhere.” (quotation omitted)).

3 Plaintiff further alleges that she “is also being treated differently from similarly situated  
 4 persons with similar medical conditions to those of the Plaintiff. . . . Other similarly situated  
 5 individuals who likewise pursue different methods of treatment for medical conditions have not  
 6 been denied their ability to obtain handguns.” (*Id.* ¶ 63.) However, although the use of  
 7 marijuana for medical purposes may not violate Nevada state law, this same use is still  
 8 prohibited under federal law. *See e.g.*, 21 U.S.C. § 844(a) (prohibiting possession of controlled  
 9 substances); *see also ATF Open Letter* (stating that “[t]he Federal government does not  
 10 recognize marijuana as a medicine”). The fact remains that, by “follow[ing] state laws for the  
 11 obtainment of treatment for her medical condition,” (Resp. 33:12–16), she is pursuing a course  
 12 of treatment that violates federal law. Thus, she is not similarly situated to individuals that  
 13 avail themselves of treatment methods *that comply with federal law*. *See Marin Alliance for*  
 14 *Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1158–59 (N.D. Cal. 2011) (concluding that  
 15 individuals for whom the use of marijuana is prohibited under federal law are not similarly  
 16 situated to individuals whose use of marijuana is permitted under federal law (in connection  
 17 with research projects funded by the Government)). Accordingly, Plaintiff has failed to plead a  
 18 valid class of persons against whom the government is discriminating in violation of the equal  
 19 protection component of the Fifth Amendment.<sup>8</sup>

20 For these reasons, Plaintiff’s complaint fails to state a plausible claim under the equal  
 21 protection component of the Fifth Amendment. Accordingly, the Court dismisses Plaintiff’s  
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23  
 24 <sup>8</sup> Even if Plaintiff had identified an appropriate class of individuals, she certainly has not established her  
 25 membership in a “suspect class.” Accordingly, “any differential treatment violates equal protection only if it  
 lacks a ‘rational basis.’” *Gonzalez-Medina*, 641 F.3d at 336. As discussed numerous times above, this policy is  
 rationally related to the Government’s legitimate interest in preventing violent crime.

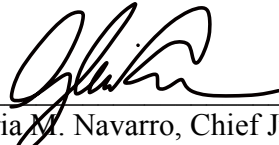
1 equal protection claim with prejudice.

2 **IV. CONCLUSION**

3 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss the First Amended  
4 Complaint (ECF No. 37) is **GRANTED** with prejudice.

5 The Clerk of the Court shall enter judgment accordingly.

6 **DATED** this 11th day of March, 2014.






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9 Gloria M. Navarro, Chief Judge  
10 United States District Judge  
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**2:11-cv-01679-GMN-PAL** Wilson v. Holder et al

Gloria M. Navarro, presiding

Peggy A. Leen, referral

**Date filed:** 10/18/2011**Date terminated:** 03/12/2014**Date of last filing:** 05/12/2014**History**

<b>Doc. No.</b>	<b>Dates</b>	<b>Description</b>
	<i>Filed &amp; Entered:</i> 10/18/2011	 Assign Judges in Civil Case
<a href="#">1</a>	<i>Filed &amp; Entered:</i> 10/18/2011	 Complaint
<a href="#">2</a>	<i>Filed &amp; Entered:</i> 10/18/2011	 Notices re AO 85 Consent to Proceed Before a Magistrate and General Order 2013-1 Short Trial Rules
<a href="#">3</a>	<i>Filed &amp; Entered:</i> 10/18/2011	 Summons Issued as to USA
<a href="#">4</a>	<i>Filed &amp; Entered:</i> 10/25/2011	 Certificate of Interested Parties
<a href="#">5</a>	<i>Filed &amp; Entered:</i> 11/03/2011	 Certificate of Service
<a href="#">6</a>	<i>Filed &amp; Entered:</i> 01/02/2012	 Certificate of Service
<a href="#">7</a>	<i>Filed &amp; Entered:</i> 01/23/2012 <i>Terminated:</i> 01/24/2012	 Motion for Leave to Appear
<a href="#">8</a>	<i>Filed:</i> 01/24/2012 <i>Entered:</i> 01/25/2012	 Order on Motion for Leave to Appear
<a href="#">9</a>	<i>Filed &amp; Entered:</i> 02/03/2012 <i>Terminated:</i> 06/21/2012	 Motion to Dismiss
<a href="#">10</a>	<i>Filed &amp; Entered:</i> 02/03/2012 <i>Terminated:</i> 12/12/2012	 Motion to Dismiss
<a href="#">11</a>	<i>Filed &amp; Entered:</i> 02/03/2012 <i>Terminated:</i> 02/06/2012	 Motion for Leave to File Excess Pages
<a href="#">12</a>	<i>Filed &amp; Entered:</i> 02/06/2012 <i>Terminated:</i> 02/07/2012	 Motion to Extend Time/Shorten Time regarding Dispositive matter
<a href="#">13</a>	<i>Filed:</i> 02/06/2012 <i>Entered:</i> 02/07/2012	 Order on Motion for Leave to File Excess Pages

<a href="#">14</a>	<i>Filed &amp; Entered:</i>	02/07/2012	 Stipulation of Dismissal
<a href="#">15</a>	<i>Filed:</i> <i>Entered:</i>	02/07/2012 02/08/2012	 Order on Motion to Extend Time/Shorten Time regarding Dispositive matter
<a href="#">16</a>	<i>Filed:</i> <i>Entered:</i>	02/07/2012 02/08/2012	 Order on Stipulation
<a href="#">17</a>	<i>Filed &amp; Entered:</i>	03/09/2012	 Response to Motion
<a href="#">18</a>	<i>Filed &amp; Entered:</i>	03/24/2012	 Notice of Change of Address
<a href="#">19</a>	<i>Filed &amp; Entered:</i>	03/27/2012	 Scheduling Order
<a href="#">20</a>	<i>Filed &amp; Entered:</i>	03/30/2012	 Reply to Response to Motion
<a href="#">21</a>	<i>Filed &amp; Entered:</i> <i>Terminated:</i>	03/30/2012 04/03/2012	 Unopposed Motion
22	<i>Filed &amp; Entered:</i>	04/03/2012	 Order on Unopposed Motion
<a href="#">23</a>	<i>Filed &amp; Entered:</i>	04/18/2012	 Status Report
<a href="#">24</a>	<i>Filed &amp; Entered:</i>	05/31/2012	 Stipulation
<a href="#">25</a>	<i>Filed:</i> <i>Entered:</i>	06/01/2012 06/04/2012	 Order on Stipulation
<a href="#">26</a>	<i>Filed:</i> <i>Entered:</i>	06/21/2012 06/22/2012	 Order on Motion to Dismiss
27	<i>Filed &amp; Entered:</i>	09/19/2012	 Minute Order Setting Hearing on Motion
<a href="#">28</a>	<i>Filed &amp; Entered:</i>	09/24/2012	 Stipulation
<a href="#">29</a>	<i>Filed:</i> <i>Entered:</i>	09/25/2012 09/26/2012	 Order on Stipulation
30	<i>Filed:</i> <i>Entered:</i>	11/02/2012 11/05/2012	 Motion Hearing
<a href="#">31</a>	<i>Filed &amp; Entered:</i> <i>Terminated:</i>	11/16/2012 12/12/2012	 Motion to Amend/Correct Complaint
32	<i>Filed &amp; Entered:</i>	12/12/2012	 Order on Motion to Dismiss
<a href="#">33</a>	<i>Filed &amp; Entered:</i>	12/12/2012	 Order on Motion to Amend/Correct Complaint
<a href="#">34</a>	<i>Filed &amp; Entered:</i>	12/17/2012	 Amended Complaint

<a href="#">35</a>	<i>Filed &amp; Entered:</i>	01/18/2013	 Transcript
<a href="#">36</a>	<i>Filed &amp; Entered:</i> <i>Terminated:</i>	01/28/2013 02/19/2013	 Motion for Leave to File Excess Pages
<a href="#">37</a>	<i>Filed &amp; Entered:</i> <i>Terminated:</i>	01/31/2013 03/12/2014	 Motion to Dismiss
<a href="#">38</a>	<i>Filed &amp; Entered:</i>	02/13/2013	 Stipulation
<a href="#">39</a>	<i>Filed:</i> <i>Entered:</i>	02/13/2013 02/14/2013	 Order on Stipulation
<a href="#">40</a>	<i>Filed &amp; Entered:</i>	02/19/2013	 Order on Motion for Leave to File Excess Pages
<a href="#">41</a>	<i>Filed &amp; Entered:</i>	02/25/2013	 Response to Motion
<a href="#">42</a>	<i>Filed &amp; Entered:</i>	02/28/2013	 Stipulation
<a href="#">43</a>	<i>Filed &amp; Entered:</i>	02/28/2013	 Order on Stipulation
<a href="#">44</a>	<i>Filed &amp; Entered:</i>	03/21/2013	 Stipulation
<a href="#">45</a>	<i>Filed &amp; Entered:</i>	03/26/2013	 Order on Stipulation
<a href="#">46</a>	<i>Filed &amp; Entered:</i> <i>Terminated:</i>	03/29/2013 01/27/2014	 Motion for Leave to File Excess Pages
<a href="#">47</a>	<i>Filed &amp; Entered:</i>	03/29/2013	 Reply to Response to Motion
<a href="#">48</a>	<i>Filed &amp; Entered:</i>	01/27/2014	 Order on Motion for Leave to File Excess Pages
<a href="#">49</a>	<i>Filed &amp; Entered:</i>	03/12/2014	 Order on Motion to Dismiss
<a href="#">50</a>	<i>Filed &amp; Entered:</i>	03/12/2014	 Clerk's Judgment
<a href="#">51</a>	<i>Filed &amp; Entered:</i>	04/10/2014	 Notice of Appeal
<a href="#">52</a>	<i>Filed &amp; Entered:</i>	04/11/2014	 Transcript Designation and Transcript Order forms
<a href="#">53</a>	<i>Filed &amp; Entered:</i>	04/11/2014	 Order for Time Schedule
<a href="#">54</a>	<i>Filed &amp; Entered:</i>	05/12/2014	 Transcript Designation

**PACER Service Center**



**CERTIFICATE OF SERVICES**

I, Jennifer J. Hurley, an employee of Rainey Legal Group PLLC, certify that the following individuals were served with the foregoing **PLAINTIFF S. ROWAN WILSON'S EXCERPTS OF RECORD**, on this date by the below identified method of service:

Electronic Case Filing

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DATED this 21st day of July 2014.

/s/Jennifer J. Hurley  
An employee of Rainey Legal Group PLLC